TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 153.

WILLIAM MILLER, PLAINTIFF IN ERROR,

vs.

WILL R. KING, SUBSTITUTED FOR THE FIRST NATIONAL BANK OF PAYETTE, IDAHO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED OCTOBER 23, 1909.

(21,883.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 22, 1911.

1 In the Supreme Court of the United States.

WILLIAM MILLER, Plaintiff in Error,
vs.
WILL R. KING, Substituted for the First National Bank of Payette, Idaho, Defendant in Error.

Appeal from the Supreme Court of Oregon.

Judgment Affirmed October 6, 1908.

Opinion by Bean, C. J.

William Miller, J. H. Richards, and Oliver O. Haga, Attorneys for Plaintiff in Error.
C. E. S. Wood, Attorney for Defendant in Error.

2 & 3 UNITED STATES OF AMERICA,
Supreme Court of Oregon, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court, in the City of Salem, this — day of October, 1909.

[Seal Supreme Court, State of Oregon, 1859.]

J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.

4 Be it remembered that heretofore on the 27th day of July, A. D. 1903, there was filed in the office of the Clerk of the Circuit Court in and for Malheur County, Oregon, a complaint in words and figures as follows, to wit:

Complainant.

In the Circuit Court of the State of Oregon for Malheur County.

THE FIRST NATIONAL BANK OF PAYETTE, IDAHO, a Corporation, Plaintiff,
vs.
WM. MILLER, Defendant.

The plaintiff for cause of action against *eh* defendant complains and alleges:

1.

That during all the times herein mentioned the plaintiff was and now is a corporation, duly organized and existing under and by

virtue of the National Banking Laws of the United States, and doing business as such in Payette, Idaho.

2.

That between the 1st day of June, 1903, and the — day of July, 1903, the defendant was the agent and attorney of the plaintiff, duly authorized as such to collect and receive, as such agent and attorney, for plaintiff, the sum of $2930.22 the amount due on that certain judgment entered in the Circuit Court of Malheur County, Oregon, on April 11th, 1903, in which Henry Helmick was plaintiff and O. W. Porter was defendant which judgment, after the date of the entry thereof, and prior to the collection thereof by defendant, to wit: on the — day of April, 1903, for valuable consideration, was duly and regularly assigned and transferred by said Henry Helmick, as judgment creditor therein, to this plaintiff. That said assignment was thereafter, on the 27th day of April, 1903, duly filed and entered of record in the County Clerk's office in Malheur County, State of Oregon, of which defendant, during all the times and dates herein alleged, had due notice;

3.

That as such agent and attorney, the defendant, on June 29th, 1903, for and on behalf of plaintiff, collected and received on said judgment the sum of $2930.22, of which amount defendant was duly authorized by plaintiff to receive and credit to himself the sum of $200.00 being the amount in full due defendant on said judgment;

(4.)

That there is now due and owing plaintiff from defendant, on moneys collected on said judgment, as aforesaid, a balance of $2730.22, with interest thereon at the rate of six per cent per annum from June 29th, 1903;

5.

That on July 18th, 1903, at Ontario, Oregon, the plaintiff demanded payment of the same from the defendant;

6.

That defendant has not paid the said sum of $2730.22 nor any part thereof;

Wherefore, plaintiff demands judgment for $2730.22, with interest thereon at the rate of six per cent per annum from June 29th, 1903, together with costs and disbursements of this action.

FRANK J. SMITH AND
WILL R. KING,
Attorneys for Plaintiff.

6 STATE OF IDAHO,
County of Canyon, ss:

I, the undersigned, being first duly sworn, say that I am the Cashier of Plaintiff in the within entitled cause, and verily believe the foregoing statements to be true.

A. P. DEVERS.

Subscribed and sworn to before me this 21st day of July, 1903.

[NOTARIAL SEAL.] ALLEN E. WOOD,
Notary Public for Idaho.

Endorsed as follows: 206-L. Complaint. In the Circuit Court for the State of Oregon for Malheur County. The First National Bank of Payette, Idaho, a corporation, Plaintiff vs. Wm. Miller Defendant Filed this 27th day of July, 1903. W. G. Thomson, Clerk. By —— ——, Deputy. Frank J. Smith and Will R. King, Attorneys for plaintiff.

7 And thereafter, to wit: on the 11 day of September, 1905, the same being the 1st Judicial Day of the regular September, 1905 Term of the said Court, there was filed with the Clerk thereof an amended answer — words and figures as follow*ing* to wit:

Amended Answer.

FIRST NATIONAL BANK OF PAYETTE, IDAHO, a Corporation, Plaintiff,
vs.
WILLIAM MILLER, Defendant.

Comes now the above defendant and by leave of court first had and obtained, files this his amended answer to the complaint of the plaintiff on file herein, and in answer thereto this defendant admits, denies and alleges:

First, for a first defense:

I.

Denies that between the 1st day of June, 1903, and the — day of July, 1903, or at any time during the month of June or July, 1903, this defendant was the agent or attorney of said plaintiff for any purpose whatsoever; denies that as the agent or attorney of plaintiff, this defendant was authorized to collect or receive for plaintiff, the sum of $2930.22 or any other sum, or the amount due on that certain judgment entered in the Circuit Court of Malheur County Oregon, on April 11th, 1903, in which Henry Helmick was plaintiff and O. W. Porter was defendant.

8 II.

As to the allegation contained in the second paragraph of said complaint that the said judgment on or about the — day of April,

1903, was duly or regularly or for a valuable consideration, assigned or transferred by said Henry Helmick to the said plaintiff, this defendant has no knowledge or information thereof sufficient to form a belief, and therefor- and by reason thereof, denies that said Henry Helmick for a valuable consideration on the — day of April, 1903, or any other time, duly or regularly assigned or transferred the said judgment to the said plaintiff.

III.

This defendant admits that a pretended assignment of said judgment was on the 27th day of April, 1903, or thereabouts, filed and entered of record in the County Clerk's office of Malheur County, Oregon, but this defendant has no knowledge or information sufficient to form a belief as to whether the pretended assignment was executed for a valuable consideration or was duly or regularly assigned or transferred by said judgment creditor Henry Helmick to the said plaintiff, and, therefore, denies that said pretended assignment was executed for any consideration whatsoever or was duly or regularly assigned or transferred to said plaintiff.

IV.

Denies that as agent or attorney for said plaintiff this defendant on July 29, 1903, or any other time, for and on behalf of the plaintiff, collected or received on said judgment the sum of $2930.22 or any other sum or sums whatsoever.

V.

Denies that there is now or was at the time of the commencement of this action, due or owing from defendant to plaintiff
9 upon moneys collected on account of said judgment or otherwise — at all, the sum of 2730.22 or any other sum whatsoever either with or without interest at the rate of six per cent per annum or any other per cent.

Second, for a second defense, for a further and separate answer this defendant alleges:

I.

That at the time he received the money on the judgment mentioned in said complaint, he was the attorney for the judgment creditor, Henry Helmick, who had theretofore recovered said judgment in the Circuit Court for Malheur County, Oregon, against the judgment debtor, O. W. Porter; and this defendant as attorney for said Henry Helmick in said action in which said judgment was recovered, and having been frequently requested and directed by said Henry Helmick to collect said judgment, was authorized to and empowered to receive the money due on the judgment.

II.

That the interests and rights of said Henry Helmick in and to said judgment, and the moneys due said Helmick from said O. W.

Porter, had long prior to the recovery of said judgment been assigned and transferred to the Moss Mercantile Company, Limited, a corporation duly organized under the laws of the State of Idaho and doing business in the Town of Payette in said State, and this defendant had been requested by said Henry Helmick before the money on said judgment had been received by this defendant, to collect said money and pay the same to said Moss Mercantile Co. less the fees and charges of this defendant; and although said assignment and transfer from said Henry Helmick to the said Moss Mercantile Co., was not of record, the said plaintiff had full knowledge thereof and of the terms thereof and of the rights and in-
10 terests of said Moss Mercantile Company, Limited, in and to said judgment and to the moneys due thereon; and the said plaintiff had said knowledge and full notice of the rights of said Moss Mercantile Co., in an- to the same, at the time the said plaintiff alleges and claims to have taken the assignment of said judgment itself, and the said plaintiff took said alleged assignment pleaded and mentioned in said complaint with full knowledge that said judgment and moneys due thereon, had previously been assigned to the Moss Mercantile Co., Ltd., and well knowing at the time of said alleged assignment the said Henry Helmick had no interest in said judgment to assign, but that the judgment and the moneys thereon belonged to the Moss Mercantile Co.

III.

That said plaintiff took said judgment from said Henry Helmick without paying any consideration therefor and solely for the purpose of collecting the same as the agent of said Henry Helmick, and without any interest in the proceeds thereof, and with the understanding and agreement that the proceeds of said judgment, if collected by plaintiff, should be by plaintiff paid to said Henry Helmick, and with the distinct understanding and agreement that the plaintiff had no interest in said judgment or the proceeds thereof, except as agent of said Henry Helmick for the collection thereof.

IV.

That at the time the defendant collected said money on said judgment he knew of the pretended assignment thereof by said Henry Helmick to the said plaintiff, but believed and understood that said plaintiff was acting simply as agent of said Henry Helmick for the collection thereof, and that said plaintiff had no interest in said judgment or the proceeds thereof; and this defendant
11 believed and understood that the said plaintiff was acting in behalf of and in the interest of the Moss Mercantile Co., Ltd., and that the proceeds thereof, if collected and paid to said plaintiff would be by plaintiff paid to the Moss Mercantile Co., in accordance with the rights and interests of said Company in and to the proceeds of said judgment.

V.

This defendant further alleges that he was one of the attorneys of said Henry Helmick in the action wherein said judgment was

obtained, as aforesaid, and was also the attorney for the said Moss Mercantile Co., but that he had never been employed by said plaintiff as its attorney and only acted for it in receiving and receipting for said money under the belief and understanding that said plaintiff had no actual interest in said judgment apart from the Moss Mercantile Co., and that in thus acting in the name of said plaintiff he was actually acting for said Henry Helmick and for said Moss Mercantile Co., in receiving and paying to said Company the moneys due it under its assignment of said judgment and in accordance with the directions of said Henry Helmick.

VI.

The defendant further alleges that after he had received said money and receipted therefor, on the records of said Court, he learned that the said plaintiff had obtained its alleged assignment thereof fraudulently and falsely and without any consideration being paid therefor, and had fraudulently and falsely induced said Henry Helmick to make said alleged assignment for the purpose of defrauding said Moss Mercantile Co., Ltd., out of the proceeds thereof, and that the plaintiff had no interest in said judgment; and this defendant well knowing that said Moss Mercantile Co., Ltd., had an assignment from said Henry Helmick, made upon a
12 valuable consideration, of all moneys to be collected on said judgment, and well knowing that said Moss Mercantile Co. Ltd., was entitled to all the proceeds thereof, thereupon paid said money and the whole thereof, less the amount due him for attorney's fees, to said Moss Mercantile Co. Ltd.

VII.

That the action of this defendant in so paying the proceeds of said judgment to the Moss Mercantile Co., has been fully ratified, approved and confirmed by said Henry Helmick.

Third, for a defense, for a further, separate and supplemental answer this defendant alleges:

I.

That at the time he received the money from O. W. Porter on that certain judgment mentioned in the complaint and recovered by Henry Helmick in the Circuit Court of Malheur County, Oregon, against O. W. Porter, and at the time he receipted on the records of said Court that said money had been duly paid and said judgment satisfied, and at the time said judgment was recovered against O. W. Porter, this defendant was the attorney of Henry Helmick and as such attorney was authorized and empowered to receive the moneys due said Henry Helmick on said judgment.

II.

That as the interest of said Helmick in said judgment had been assigned and transferred to the Moss Mercantile Co. Ltd., a corpora-

tion duly organized under the laws of the State of Idaho and doing business at Payette, Idaho, prior to the receipt by this defendant of the moneys due on said judgment, this defendant paid the said money so collected on said judgment to the said Moss Mercantile Co. in accordance with the assignment of said Henry Helmick to said Moss Mercantile Company, and as he had been requested to do by the said Henry Helmick.

13 III.

This defendant further alleges that although the assignment and transfer of the interest of Henry Helmick to and in the said judgment to the Moss Mercantile Co. Ltd., was not of record, the plaintiff and its officers had full knowledge thereof and of the contents thereof and of the right and interests of the Moss Mercantile Co. in and to the proceeds of said judgment, at the time plaintiff took and claims to have taken its alleged assignment of said judgment and for a long time prior thereto; and said plaintiff took the said alleged assignment well and fully knowing of the rights of said Moss Mercantile Co. in and to said judgment and the proceeds thereof; and the said plaintiff took its alleged assignment of said judgment without paying any consideraton therefor, and falsely and fraudulently and for the sole purpose of cheating and defrauding the Moss Mercantile Co., induced and persuaded the said Henry Helmick to execute the alleged assignment of said judgment, under the promise and agreement with said Helmick that the proceeds of said judgment, when collected, should be paid to said Henry Helmick, and with the understanding and agreement that the said plaintiff should have no interest whatsoever therein, but would collect the same and the proceeds thereof for the purpose of cheating and defrauding the said Moss Mercantile Co. Ltd., out of the proceeds of said judgment.

IV.

That at the time this defendant recovered said money on said judgment and receipted on the records of said Court for the payment thereof, this defendant knew of the alleged assignment by said Henry Helmick to the plaintiff, but was not at that time aware of any fraud intended thereby, but on the contrary this defendant believed that said plaintiff was acting in that behalf in the

14 interest of the Moss Mercantile Co. Ltd., and that the plaintiff and said Company had a common interest in the collection of said judgment; and this defendant believed that, notwithstanding the alleged assignment of plaintiff, the money collected should nevertheless be paid to the Moss Mercantile Co. in accordance with its prior assignment of said judgment and in accordance with the prior directions of said Henry Helmick, and in receipting for the moneys received on account of said judgment, this defendant believed that he was representing, acting as he had always acted, as attorney for said Helmick and the Moss Mercantile Co. and not as attorney for said plaintiff; and this defendant further believed and understood that the said plaintiff had no interest in said judg-

ment, except such interest as it might have in common with the Moss Mercantile Co. Ltd.

V.

This defendant further alleges that after he had received said money and receipted therefor, he learned and was informed that the said plaintiff had falsely and fraudulently persuaded and induced said Helmick to make said alleged assignment of judgment to plaintiff without any consideration whatsoever and for the sole purpose of cheating and defrauding the said Moss Mercantile Co. out of the proceeds thereof; and that plaintiff had no interest whatsoever in said judgment or in the proceeds thereof; and this defendant knowing that said Moss Mercantile Co. had a valid assignment from said Helmick to all moneys to be collected on said judgment and well knowing that the said Moss Mercantile Co. was entitled to the proceeds thereof and that the plaintiff was not entitled thereto, paid said money and the whole thereof, less the amount due him for attorney's fees, to said Moss Mercantile Co.

VI.

This defendant further alleges that since the beginning
15 of this action the said Henry Helmick has revoked, cancelled and set aside said alleged assignment of said judgment of said plaintiff, and has revoked, cancelled, and annulled all the right and authority previously granted or attempted to be granted to said plaintiff to act for the said Henry Helmick in the collection of said judgment; and the said Henry Helmick has fully ratified, confirmed and endorsed the payment by this defendant, of said money to the Moss Mercantile Co., and had fully ratified and confirmed all the acts of this defendant in respect to the collection, receipt and payment of said money.

VII.

This defendant further alleges that the said Henry Helmick has revoked, cancelled, set aside and annulled the right and authority of the said plaintiff to collect said judgment or to receive the proceeds thereof, or to bring any action for the collection thereof; and that the said action of plaintiff against this defendant is brought and is now being prosecuted by the said plaintiff, without authority from said Henry Helmick and against the wishes and against the protests of said Henry Helmick, and without any right on the part of said plaintiff either as agent for said Henry Helmick for the collection of said judgment or as an alleged assignee of said judgment; and that the said action is prosecuted by said plaintiff solely for the purpose of harassing and annoying this defendant, and without any right or interest whatsoever on the part of said plaintiff in or to said judgment of the proceeds thereof or the subject matter of this action.

Wherefore, this defendant, having fully answered, demands judgment for his costs and disbursements herein.

RICHARDS & HAGA AND
WM. MILLER,
Attorneys for Defendant.

16 STATE OF OREGON,
County of Harney, ss:

I, Wm. Miller, being first duly sworn, depose and say: That I am the defendant above named; and that the foregoing is true as I verily believe.

WM. MILLER.

Subscribed and sworn to before me, this 7th day of Sept., 1905.

N. U. CARPENTER,
Notary Public.

STATE OF OREGON,
County of Malheur, ss:

Due service of the within answer is hereby accepted in Vale, Malheur County, this 11th day of Sept., 1905, by receiving a copy thereof, duly certify to as such by O. O. Haga, one of the attorneys for the defendant, Wm. Miller.

One WILL R. KING,
Attorney for Plaintiff.

Endorsed as follows: In the Circuit Court for Malheur County, State of Oregon. First National Bank of Payette, Plaintiff, vs. William Miller, Defendant. Amended Answer. Filed Sept. 11th, 1905. W. G. Thomosn, County Clerk. Richards & Haga & Wm. Miller, Attorneys for Defendant.

17 And thereafter to wit: on the 13th day of March, 1906, the same being the 2d Judicial Day of the regular March 1, 1906 Term of the said Court there was filed in the office of the Clerk thereof a reply in words and figures following to wit:

Reply.

FIRST NATIONAL BANK OF PAYETTE, IDAHO, Plaintiff,
vs.
WILLIAM MILLER, Defendant.

Comes now the plaintiff for reply to defendant's Amended answer herein and denies, admits and alleges as follows:

Denies generally and specifically each and every allegation in said answer, except that at the time a certain judgment was obtained against O. W. Porter, in favor of Henry Helmick, the defendant herein was one of the attorneys for *said* Helmick, but denies that he

was such attorney, for said Helmick, at any time after said date or time.

Admits that defendant received the moneys and amount of moneys alleged in plaintiff's complaint and in the manner in said complaint alleged; and plaintiff further replying, alleges:

That the defendant ought not to be permitted to allege and should be, and is, estopped, in alleging; that at the time he received the money referred to in complaint and answer, that he was acting as attorney, either for Henry Helmick or the Moss Mercantile Co., or that he thought plaintiff was collecting the same for said Moss Mercantile Co., or that the said Moss Mercantile Co., and plaintiff had an interest in common in said collection *in* said judgment, or that defendant thought at said time, that said judgment had
18 previously been assigned or transferred to said Moss Mercantile Company; or that plaintiff took said assignment with knowledge of the alleged rights of said Moss Mercantile Co.; or that plaintiff falsely or fraudulently signed said judgment to it, without consideration, or for any purposes alleged in defendant's answer; or that defendant had no actual interest in said judgment; and should not be permitted to allege any of the reasons or excuses given in said answer for paying the moneys collected, (And which were collected for plaintiff only) to the Moss Mercantile Co. in that:

Defendant requested permission of the plaintiff to act as plaintiff's attorney in collecting and receiving the money due on said judgment from said Henry Helmick, under the assignment given by the said Henry Helmick to the plaintiff, with the express understanding and agreement that he would collect the same turn over all of the moneys received therefrom to the plaintiff, in consideration of plaintiff permitting the defendant to have and take out of said judgment, the sum of ($200.00) two hundred dollars, due the defendant from said Henry Helmick, which $200.00 defendant received under said agreement out of said collection.

That in consideration of defendant going to Vale and collecting and receipting for, and receiving said money, on behalf of plaintiff, the plaintiff accepted the said offer made by defendant, in good faith; and the defendant thereupon, entered upon the performance of said contract made with plaintiff and duly received the money on said judgment, under said agreement and understanding, and as attorney for the plaintiff only, and in order to get possession of said money on said judgment, and in order to induce the clerk of Malheur County, Oregon, (which clerk then and there had in his possession all the money due on said judgment), that he, the defendant, was duly authorized to collect said money, under the assignment from Henry Helmick to the plaintiff and was then and there at-
19 torney for said plaintiff, and the clerk upon such representation, and said representation and agreement only, permitted the defendant to receive all the money due on said judgment;

That plaintiff acted upon the said agreement made with the defendant and in reference to the collection of said funds, and has been and is, deceived and misled; and had it not been for said agreement and representation of the defendant, the defendant would not have

been permitted to receive said money, but the same would have been paid by the clerk direct to the plaintiff, and to the plaintiff only, and plaintiff would have come into possession of the same under said assignment and thereby been saved great annoyance, delay and expense in obtaining the same: and the plaintiff alleges upon information and belief, that defendant, acting in collusion with said Moss Mercantile Company, made said agreement with representations to, the plaintiff, and said representations to the Clerk of Malheur County, Oregon, for the express, deliberate and premeditated purpose of receiving and misleading plaintiff and said clerk, in order to get possession of said funds and deliver possession thereof, in fraud of plaintiff's rights, to the said Moss Mercantile Co.

Wherefore, Plaintiff prays judgment against the defendant, as in its complaint demanded.

KING & BROOKE.
Attorneys for Plaintiff.

20 STATE OF OREGON,
County of Malheur, ss:

I, the undersigned, being first duly sworn, upon my oath say; that I am one of the Attorneys for plaintiff in the within entitled cause, know the contents of the foregoing instrument and verily believe the same to be true. That I make this verification for the reason that the plaintiff is a non-resident corporation.

WILL R. KING.

Subscribed and sworn to before me this 13th day of March, 1906.

W. H. BROOKE.
Notary Public for Oregon.

Reply. In the Circuit Court of the State of Oregon for Malheur County. First National Bank of Payette, Idaho, Plaintiff, vs. William Miller, Defendant. Filed this 13th day of March, 1906. W. G. Thomson, Clerk. King and Brooke, Attorneys for Plaintiff.

21 And thereafter to wit, on the 25th day of April, 1907, the same being the 4th Judicial Day of the regular April, 1907 Term of the sai- Court, there was filed in the office of the Clerk thereof an affidavit in words and figures following:

Affidavit.

WILL R. KING, Substituted for The First National Bank of Payette, Idaho, Respondent,
vs.
WM. MILLER, Defendant.

STATE OF OREGON,
County of Malheur, ss:

I, Will R. King, first being duly sworn, say:
That I am the plaintiff in the above entitled action, having been

substituted as such plaintiff by an order of the Supreme Court duly made and entered in that certain action on appeal in said court wherein the First National Bank of Payette, Idaho, was plaintiff and respondent and Wm. Miller was defendant and appellant, a certified copy of which order of substitution is hereto attached, marked Exhibit "A" and made a part hereof;

That prior to the application to the Supreme Court for said order of substitution an assignment of that certain claim and judgment in favor of the First National Bank of Payette, Idaho, against William Miller involved on appeal in said cause, was duly and regularly executed to me and said motion and application for substitution in said Supreme Court was based upon the said assignment a certified copy of which assignment is hereto attached and made a part hereof and marked Exhibit "B."

Wherefore, plaintiff prays that the certain motion heretofore
22 filed in this Court entitled in said motion, and in said motion only, as the First National Bank of Payette, Idaho, a corporation, plaintiff versus William Miller, defendant, be denied.

WILL R. KING.

Subscribed and sworn to before me this 28th day of April, 1907.

B. W. MULKY, *County Clerk*,
By T. E. McKNIGHT, *Deputy*.

Be it remembered that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the city of Salem, on the first Monday, the 1st day of the October 1906 —.

Present: Hon. Robert S. Bean, Chief Justice, Hon. Frank A. Moore, Associate Justice, Hon. Robert Eakin, Associate Justice, and J. J. Murphy, Clerk, the following proce-dings were had on Wednesday the 6th day of February, 1907, the same being the 51st judicial day of said term:

FIRST NATIONAL BANK OF PAYETTE, IDAHO, a Corporation, Respondent,
vs.
WILLIAM MILLER, Appellant.

Appeal from Malheur County.

Comes now Will R. King attorney for the respondent and shows to the court that on November 5, 1906, an order was made on his motion substituting him as respondent in the place and stead of said Bank and its appearing by a memorandum made by Justice Moore that such order was made at Pendleton term of the court.

And it further appearing that the entry of such order was inadvertently omitted from the record of said cause; It is now ordered
by the court that said order of November 5, 1906, be entered
23 of record as of the day and date now for then. Said order of November 5, 1906, being as follows, to wit:

FIRST NATIONAL BANK OF PAYETTE, IDAHO, a Corporation, Respondent,

vs.

WILLIAM MILLER, Appellant.

Appeal from Malheur County.

Entry of Order of Nov. 5th, 1906, Nunc pro Tunc.

It is ordered by the court on motion of Will R. King made in open court this 5th day of November, 1906, the attorneys for appellant consenting thereto, that the said Will R. King be and he is hereby substituted as respondent in the place *an* and stead of the *said* Bank. It appearing that he is the present owner of the judgment of the court below, given in favor of said Bank in said cause.

STATE OF OREGON,
County of Marion, ss:

I, J. J. Murphy, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing transcript has been by me compared with the original, and that it is a correct transcript therefrom, and the whole of such original as the same appears of record, and in my office and custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Salem, Oregon, this 22d day of April, 1907.

J. J. MURPHY, *Clerk*,
By ARTHUR S. BENSON, *Deputy*.

24 This indenture made this 29 day of March, 1906, by and between the First National Bank of Payette, Idaho, a corporation, party of the first part, and Will R. King, of Ontario, Oregon, party of the second part, witnesseth:

That whereas, the party of the first part has recovered and obtained a certain judgment in the Circuit Court of Malheur County (in March, 1906) against William Miller, for the sum of $3173.42, more or less, with costs.

Now, therefore, the party of the first part in consideration of the sum of one dollar, and other valuable consideration to it in hand paid, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell, convey and *issing* unto said Will R. King, all that certain judg*mgnet* above referred to, in favor of the *fi* party of the first part, wherein the said first party hereto was plaintiff and one Wm. Miller, of Burns, Oregon, was defendant, *ro* have and to hold the *sacm* unto him, the said Will R. King.

In witness whereof, the said party of the first part hereunto sets its hands and seal this the 29 day of March, 1906.

THE FIRST NATIONAL BANK OF PAYETTE, IDAHO.
GEO. V. LEIGHTON, *Pres't.* [SEAL.]
P. A. DEVERS, *Cashier.* [SEAL.]

Executed in the presence of:
A. J. BOEHMER,
J. F. HARADER.

STATE OF IDAHO,
County of Canyon, ss:

On this 29 day of March, 1906, before me, a Notary Public, in and for said County and State, personally appeared P. A. Devers, known to me to be the cashier of the corporation that executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and official seal this 29 day of March, 1906.

[NOTARIAL SEAL.] ALLEN E. WOOD,
N. P. for Idaho, Residing at Payette Therein.

25 STATE OF OREGON,
County of Malheur, ss:

I, B. W. Mulky, County Clerk of Malheur County, State of Oregon, hereby Certify that the foregoing copy of assignment of Judgment had been by me compared with the original thereof, and that it is a true and correct copy therefrom, and of the whole of such original, together with the endorsements thereon, as the same appears of record in Judgment Liens Docket "A" page 65, now in my office.

In witness whereof, I have hereunto set my hand and official seal this 25 day of April A. D. 1907.

B. W. MULKY, *Clerk,*
By T. E. McKNIGHT, *Deputy.*

206—L.

Affidavit. In the Circuit Court of the State of Oregon for Malheur County. Will R. King, substituted for the 1st National Bank of Payette, Idaho, a corporation, plaintiff, vs. William Miller, defendant. Filed this 25 day of April, 1906. B. W. Mulky, clerk. Brooke & Saxton, Attorneys for Plaintiff.

26 And thereafter to wit on the 26th day of April 1907 the same being the 5th Judicial Day, of the regular April Term of 1907 of said Court, the defendant filed the following motion to dismiss:

Motion to Dismiss.

FIRST NATIONAL BANK OF PAYETTE, IDAHO, a Corporation, Plaintiff,
vs.
WILLIAM MILLER, Defendant.

Now comes the defendant above named, by his attorneys, and moves the court for an order dismissing the above entitled action on such terms as to the Court may seem proper.

This motion is based upon the records and files in the cause and

upon a release in full, executed by the said plaintiff to this defendant, a copy of which is attached hereto and made a part hereof.

RICHARD & HAGA,
Attorneys for Defendant.

Plaintiff hereby consents to the foregoing motion, and consents that the action may be dismissed at plaintiff's costs.

A. N. SOLISS,
Attorney for Plaintiff.

27 *Release of All Demands.*

Know all men by these presents, That the First National Bank of Payette, Idaho, a corporation incorporated under the National Banking Laws of the United States of America, for and in consideration of the sum of One Dollar and other causes it thereunto moving, has released and forever discharged, and by these presents does for itself, its successors and assigns, release and forever discharge William Miller, Esq., of Burns, Oregon, his heirs, executors and administ*ar*tors, of and from all and all manner of actions, and causes of actions suits debts, dues, acts, reckonings, covenants, controversies, agreements, damages, judgments and claims and demands of whatsoever nature, in law or in equity, which against the said William Miller the undersigned ever had and now has, or which it, it- successors, or assigns, hereafter can, shall or *amy* have for, upon or by reason of any matter, cause or thing whatsoever arising prior to the date of these presents, and particularly from the matters embraced in or connected with that certain action now pending in the Circuit Court of the State of Oregon for Malheur County, wherein the undersigned is plaintiff and the said William Miller is defendant.

In witness whereof, the said First National Bank of Payette, Idaho, by resolution of its Board of Directors, a copy of which is hereto attached and made a part hereof, has caused these presents to be subscribed to by its President and Cashier and its corporate seal and name to be hereto attached this 24 day of April, 1907.

FIRST NATIONAL BANK OF
PAYETTE, IDAHO,
By A. B. MOSS, *President.*

Attest:
M. F. ALBERT.

28 Endorsed as follows: 206—L. In the Circuit Court of the State of Oregon for Malheur County. The First National Bank of Payette, Idaho, a corporation, Plaintiff, vs. William Miller, Defendant. Motion to Dismiss. Filed April 26th, 1907. B. W. Mulky, Clerk.

29 Upon which motion upon the same day the court made the following ruling:

Ruling.

FIRST NATIONAL BANK OF PAYETTE, IDAHO, a Corporation, Plaintiff,
vs.
WILLIAM MILLER, Defendant.

Now at this time this matter coming on to be heard in open court upon the motion of the defendant by its attorney for an order dismissing the above entitled action on such terms as the Court may seem proper, and the Court having *and* considered said motion and being fully advised in the premises,

It is considered and ordered that said motion be, and the same hereby is, denied and overruled.

GEO. E. DAVIS, *Judge.*

30 Endorsed as follows: In the Circuit Court of the State of Oregon for Malheur County. The First National Bank of Payette, Idaho, a Corporation, Plaintiff, vs. William Miller, Defendant. Motion. Filed May 3d, 1907. B. W. Mulky, Clerk.

31 And thereafter on the same day was filed defendant's supplemental answer in words and figures following, to wit:

Supplemental Answer.

THE FIRST NATIONAL BANK OF PAYETTE, IDAHO, a Corporation, Plaintiff,
vs.
WILLIAM MILLER, Defendant.

Now comes the defendant, by his attorneys, by leave of the Court first obtained, and files this his supplemental answer, and avers and shows that heretofore, to wit: on the 24th day of April, A. D. 1907, and since the former trial of this cause, that plaintiff, the First National Bank of Payette, Idaho, by authority of its Board of Directors and by its proper officers, has made and delivered to this defendant a full release, discharge and satisfaction of all claims and demands of every name and kind, between said plaintiff and this defendant, and especially a full release, discharge and satisfaction of all claims and demands aver-ed and set out in the complaint of plaintiff on file in this cause.

Wherefore, defendant prays that this action be dismissed and that plaintiff take nothing by his complaint herein.

RICHARD & HAGA,
Attorneys for Defendant.

STATE OF OREGON,
County of Malheur, ss:

I, William Miller, being first duly sworn, depose and say, that I am the defendant above named and that the foregoing answer is true, as I verily believe.

WILLIAM MILLER.

32 Subscribed and sworn to, before me, this 2d day of May, 1907.

B. W. MULKY, *Clerk.*

Endorsed as follows: In the Circuit Court of the State of Oregon for Malheur County. The First National Bank of Payette, Idaho, a Corporation, Plaintiff, vs. William Miller, Defendant. Supplemental Answer. Filed May 3rd, 1907. B. W. Mulky, Clerk.

33 And thereafter on the same day in the said Court was made the following Order of Substitution:

Order of Substitution.

WILL R. KING, Substituted for The First National Bank of Payette, Idaho, Plaintiff,

vs.

WILLIAM MILLER, Defendant.

Journal Entry.

Now at this time this cause coming on upon the motion of Will R. King to be substituted as plaintiff in the above entitled action, the said Will R. King appearing in person and by C. E. S. Wood, and Brooke & Saxton of counsel, and the said First National Bank of Payette, Idaho, appearing by A. N. Soliss of counsel, and the defendant appearing in person and by Richards & Haga of counsel, and it appearing to the Court that the said Will R. King has succeeded to all the rights and interests of the said First National Bank of Payette, Idaho, in and to this suit and the subject matter thereof, and has heretofore been substituted for said Bank in this cause in the Supreme Court of this State by order of such Court.

It is therefore ordered, considered and adjudged that the said Will R. King be, and he hereby is, substituted for the said First National Bank of Payette, Idaho, as plaintiff in this cause.

GEO. E. DAVIS,
Circuit Judge.

34 And thereafter to wit: on the same day the cause came on for trial whereupon the following proceedings were had:

Trial.

WILL R. KING, Substituted for The First National Bank of Payette, Idaho, a Corporation, Plaintiff,

vs.

WILLIAM MILLER, Defendant.

Now on this 3rd day of May, 1907, this cause coming on for trial and plaintiff appearing in person and by Brooke & Saxton and

C. E. S. Wood, his attorneys, and defendant appearing in person and by Richards & Haga, his attorneys, and the parties having signified their readiness for trial, the Court directed the Clerk to shake the box and draw a jury, whereupon the following lawful jury, to wit: S. A. Moore, G. L. Betterly, J. R. Blackabay, F. A. Miller, J. U. Huffman, M. A. Patch, E. E. Jones, R. D. Greer, C. C. Forbes, Arhtur McPherson, and Z. T. Smith, were examined and accepted, empanneled and sworn; and the respective parties agreed to try the cause with eleven jurors.

Whereupon the respective counsel proceeded to make their opening statements and both plaintiff and defendant introduced their evidence and rested *and* their respective cases, and after argument by the respective counsel and the instructions of the Court the jury retired and in the custody of the bailiff to deliberate upon their verdict and returned into open Court the following verdict:

Verdict.

"In the Circuit Court of the State of Oregon for Malheur County."

WILL R. KING, Substituted for The First National Bank of Payette, a Corporation, Plaintiff,
vs.
WILLIAM MILLER, Defendant.

We, the trial jury empannelled and sworn to try the above entitled action, find for the plaintiff and against the defendant in the sum of $3359.97.

S. A. MOORE, *Foreman.*

which said verdict was received by the Court, accepted and ordered filed. May 3rd.

35 And thereafter to wit, on the 4th day of May, 1907, the same being the 12th Judicial Day of the regul-r April 1907 Term of the said Court, the Court entered the following judgment:

Judgment.

WILL R. KING, Substituted for The First National Bank of Payette, Idaho, a Corporation, Plaintiff,
vs.
WILLIAM MILLER, Defendant.

Now at this time this matter coming on for consideration upon the motion of plaintiff by his attorneys for judgment on the verdict heretofore rendered herein, plaintiff appearing in person and by Brooke & Saxton, his attorneys, and defendant appearing in person and consenting that judgment be rendered at this time, and waiving

time for making objections, and said cause having heretogore to wit, on May first, 1907, been submitted for trial and the jury having returned into this Court a verdict for the sum of $3359.97 in favor of plaintiff and against defendant, and defendant having made and making no objections to the rendering of this judgment upon said verdict,

Now, therefore, upon motion of said plaintiff it is hereby considered, ordered and adjudged that plaintiff have judgment against defendant William Miller for the sum of $3359.97 and for his costs and disbursements taxed at $490.00, and that execution issue therefor.

And it is further ordered that this judgment and costs bear interest at the rate of six per cent per annum from date hereof until satisfied.

It is further ordered that defendant may have ninety days in which to prepare a bill of exceptions herein.

May 4th.

GEO. E. DAVIS,
Circuit Judge.

36 And thereafter to wit on the 9th day of September, 1907, there was filed in the office of the said Clerk of the said Court the Bill of Exceptions in words and figures following that is to say:

37 In the Circuit Court of the State of Oregon for Malheur County.

WILL R. KING, Plaintiff by Substitution for The First National Bank of Payette, Idaho,

vs.

WILLIAM MILLER, Defendant.

Bill of Exceptions as settled and allowed.

38 Be it remembered, That on this 3rd day of May, 1907, this cause came on for trial before the Honorable Geo. E. Davis, Judge of the above entitled Court, and a jury duly empanelled The Plaintiff, The First National Bank of Payette, Idaho, appearing by its attorney, A. N. Soliss and Will R. King, appearing by Brooke & Saxton and C. E. S. Wood, his attorneys, and the defendant appearing *by* in person and by J. H. Richards, his attorney.

Whereupon, among other things, the following proceedings were had:

(Title.)

"MAY 3RD, 1907.

Now at this time the above entitled action having been called for trial in the above entitled Court, and the jury having been empanelled and sworn to try said cause, and thereafter *on* Will R. King having by order of the Court over the objection of plaintiff been substituted for the plaintiff in the above entitled action, comes the

First National Bank of Payette, Idaho, by its attorney, A. N. Soliss, and objects to any further proceedings being taken or had in this Court in the above entitled action, and to any further hearing of a said cause, and of any matter growing out of the same, and moves the Court that said action be dismissed at the cost of plaintiff, the First National Bank of Payette, Idaho, and the Court having considered said motion and being advised in the premises,

It is considered and ordered that said motion be and hereby is denied and overruled.

(Certificate of Clerk.)"

It is stipulated in open Court by counsel for the respective parties, that the reply to the supplemental answer herein may be considered filed.

Whereupon, counsel for Will R. King moves the Court that the entry of the order of substitution made in the Supreme Court, being not entered in this Court in this action, be now entered in this Court, substituting Will R. King as plaintiff in this action.

Counsel for defendant objects to this motion on the following grounds:

First. Because it entirely changes the issues in thi- case; and,

Second. Because the defendant herein has had no notice of any such intention.

39 Which objection was overruled by the Court, and the motion allowed, and order of substitution entered, and exception allowed.

40 To maintain the issues joined in the pleadings on the part of the plaintiff, counsel for plaintiff herein offers in evidence a certified copy of the judgment in the case of Helmick vs. O. W. Porter. The same was received in evidence, marked Exhibit "1" Plaintiff's proof, and read to the jury, and shows the judgment entered on the 11th day of April 1903, in favor of Henry Helmick and against O. W. Porter for $2,775.00, and costs and disbursements taxed at $120.00.

Counsel for plaintiff here offers in evidence a satisfaction of such judgment, with receipt of Wm. Miller, which is admitted in evidence and marked Exhibit "2" plaintiff's proof, showing judgment Debtor, O. W. Porter; Judgment Creditor, Henry Helmick; Amount of judgment $2775.00; Costs $120.0- Interest, $35.22; Date of Entry, April 11, 1903; and receipt showing date of receipt June 29, 1903, amount of principal, interest and costs received, $2930.22; satisfaction of *judgme* judgment; signed, Henry Helmick. First National Bank, Payette, Idaho, by Wm. Miller, Att'y.

Counsel for plaintiff here offers in evidence a certified copy of the assignment of this judgment to the First National Bank of Payette, Idaho, by Henry Helmick, which was received in evidence marked Exhibit "3" Plaintiff's proof, *a* and read to the jury, and showing Henry Helmick as party of the first part, consideration $1.00, paid by the First National Bank of Payette, Idaho, party of the second part, and the assignment of the above judgment to the First National

Bank and the oppointment of the *second* party of the second part and its assigns as the true and lawful attorney of the first party, irrevocable, with power of substitution and revocation to demand and receive the mooney on such judgment, take out execution in the name of the first party, or otherwise, for the recovery of the money due or to become due on such judgment, and on payment to
41 acknowledge satisfaction or discharge of the same; signed, Henry Helmick. Witness, P. A. Devers. Duly acknowledged. Endorsement showing record of same, and certificate of the County Clerk.

P. A. DEVERS, being called and duly sworn as a witness on behalf of the plaintiff, testified as follows:

I lived at Payette, Idaho, for about ten years up to October, 1906. I was cashier of the Payette National Bank of Payette, Idaho. I know Henry Helmick. I received in behalf of the Bank that assignment from Henry Helmick (ex. 3) and took his acknowledgment thereto as Notary Public. The Bank had no interest in that assignment.

Q. Mr. Devers, at the time you received that assignmment did Mr. Helmick give you any instructions what to do with the money?

A. He did.

Q. What were those instructions?

Counsel for defendant object to this at this time, unless defendant is permitted to cross-examine the witness, which request was granted.

By Mr. RICHARDS:

Q. Mr. Devers, at the time this assignment was taken, did the Bank give a receipt in writing in relation to this assignment?

A. They did, yes sir.

Q. (A paper shown witness.) Just state, Mr. Devers, what that is?

A. It is a receipt from the Bank for the assignment of the judgment against O. W. Porter, Malheur County, for $2775.00; $120.00 costs; entered for collection. It shows that when collection is made it shall be subject to order of Henry Helmick, etc. Given to Henry Helmick and signed by myself as cashier of the Bank.

Q. At the time you received the assignment of the judgment?

42 A. Given at the time I received the assignment of the judgment.

Counsel for defendant at this time objects to the witness stating any instructions orally given by Henry Helmick for the reason that the writing that the witness has just conceded that he gave for the assignment, shows what was to be done with the money; and that any conversation prior to that were merged in that writing. Objection overruled. Exception allowed.

Mr. Wood continues:

Q. What were those instructions?

A. They were to pay over to Mr. Lauer the amount due him.

That was discussed there, about $500.00, and the balance to be delivered to him, either to be placed to credit on open account or by certificate in such way as he might deem best.

Q. Now, did you get those instructions at the time you received the assignment?

A. I did, yes sir.

Q. Did you receive any such instructions before you took the assignment formally?

A. It was at the time I took the assignment.

Q. Did he repeat it to you subsequently, after giving the assignment?

A. He did, yes sir.

Q. Did you communicate these facts to Mr. Lauer, or was he cognizant of that?

A. He was present the first time when the matter was arranged.

Q. And you agreed to accept this trust, did you?

A. I did, yes sir.

Counsel for defendant moved to strike out the above testimony given by the witness, for the reason there is no issue in the pleadings in this matter relating to any such instructions or authority on the part of the Bank; and for the reason that the Bank shows by
43 its receipt that it has no *no* interest in the matter, and took it wholly for Mr. Helmick. Mortion overruled. Exception allowed.

Witness continues:

I notified Mr. Miller, the defendant, that I had this assignment in writing, dated April 27, 1903.

This letter was offered in evidence, being Exhibit "D" Defendant's proof, in the equity case, marked Exhibit "4" Plaintiff's Proof, and read to the jury, in the following words:

"William Miller, Esq., Ontario, Oregon.

DEAR SIR: In the matter of Helmick vs. O. W. Porter, we have an assignment of the judgment in the case which has been filed at Vale, and I would like to know if an appeal has been taken in the case or notice thereof filed. If not, how much time has defendant in which he may give notice of appeal. If time has passed how much time may elapse before execution may issue in event judgment is not promptly paid.

Yours truly,

P. A. DEVERS, *Cash.*"

I received a reply from Mr. Miller addressed to the First National Bank of Payette, Idaho, and signed Wm. Miller, and dated 4-30-1903.

This letter was received in evidence, marked Exhibit "5" Plaintiff's proof, and read to the jury, and is in the following words:

"DEAR SIRS: In the case of Helmick v. Porter defendant has ninety days from date of judgment in which to appeal or rather to prepare

and file bill of exceptions; it is safe to say that the matter will not be determined until after the November Term of the Supreme Court at Pendleton. Could you advance me $100.00 on my attorney fee in the case?"

These letters were written and received on approximately the dates they purport to bear, in the due course of mail. I asked Mr. Miller for the proceeds of this judgment after it was assigned to the Bank, but did not get such proceeds. I made a demand in writing for the proceeds of this judgment by letter dated July 18, 1903, addressed to Wm. Miller and signed, the First National Bank of Payette, by P. A. Devers, Cashier.

44 This letter was received in evidence marked Exhibit "6" Plaintiff's proof, and read to the jury, in the following words:

"The First National Bank, of Payette, Idaho, hereby demands immediate payment of all moneys collected by you on that certain judgment in the Circuit Court of Malheur County, Oregon, entered on April 11, 1903, in said Circuit Court, in which Henry Helmick was and is plaintiff and O. W. Porter was and is defendant, on which judgment you collected for and on behalf of said First National Bank of Payette, Idaho, the sum of $2930.22, and satisfied the judgment of record for and on behalf of said First National Bank.

You are authorized to retain out of the moneys collected on said judgment your attorney fees in said action between said Helmick and Porter, amounting to $200.00, and you are hereby directed to pay the balance over to this Bank forthwith."

I got a reply to that letter, in writing, dated July 18, 1903, signed, Wm. Miller, addressed to the First National Bank of Payette, Idaho.

This letter was received in evidence marked Exhibit "7" Plaintiff's proof, and read to the jury, and is in the following words:

"DEAR SIRS: I cannot comply with your request for the reason that I have already turned over the above amount of money, to wit: $2730.22, to the Moss Mercantile Company of Payette, Idaho, the said Henry Helmick Judgment Creditor having assigned all his right and interest in the result of said action to the Moss Mercantile Company prior to his said assignment thereof to your Bank and of which you the First National Bank had due notice."

I had conversation on this subject with Mr. Miller by phone after the assignment, probably in July following the assignment. I called Mr. Miller over the phone and asked him if the judgment had been paid. He said he understood it was and he was going up to collect it. I told him that he should not do that, that the judgment belonged to us and we would look after the collecting of it. He said he didn't care who collected it so long as he got his fee out of it, and asked us if we would take care of it, and I said yes sir. I suggested it should be taken care of out of the judgment. A little afterwards I consulted Mr. Lauer and immediately called up Mr.

Miller on the phone again and told him he could collect the judgment, hold out his fee, which I think was $200.00, and remit the balance to the First National Bank; and he said "all right,"
45 Some time after not hearing from him I called him up again, and asked him if he had collected the judgment. He said "Yes" and wanted to know if Mr. Moss, had not called on me. I told him "No" that Mr. Moss had nothing to do with our affiars in regard to it, and I think he referred me to Judge Richards. This first conversation was before he had collected the judgment. The bank did not receive anything on this judgment, and not to my knowledge has the bank, myself, or Will R. King received anything.

Q. I will ask you whether the First National Bank of Payette ever assigned this judgment, which it had received by assignment from Henry Helmick, to any one?

Objected to on the ground that it is not the best evidence. Objection overruled, Exception allowed.

Q. Did the bank ever assign this judgment to any one?

A. It did.

Q. I show you a paper and ask you whether that is *a* copy of the assignment, a copy of that assignment?

A. Yes sir, that is a copy of the assignment.

Q. Executed by you as cashier of the Bank?

A. Yes Sir.

The same is here offered in evidence. Counsel for defendant at this point requests the privilege of examining the witness.

Request granted.

By Judge RICHARDS:

Q. Mr. Devers, at the time you claim the bank made this assignment about which you have just been interrogated, did you know at that time that Henry Helmick had previously given an order to the Moss Mercantile Company in writing for all the money that was due under the Porter Judgment?

A. Well not unless in such evidence as was introduced here at the trial at one time.

Q. You were present at that time.

A. Yes sir.

46 Q. And prior to this assignment you knew of that fact?

A. I did.

Q. You were aware at that time that Mr. Helmick was indebted to the Moss Mercantile Company?

Objected to by counsel for plaintiff as immaterial. Objection allowed. Exception allowed defendant.

Q. At the time the Bank made this assignment, were you aware or not that Mr. Helmick had revoked the former assignment to the bank that had been introduced in evidence?

A. Well only such information as was given here in the trial of the cause.

Q. You heard it discussed?
A. I did. Yes sir.
Q. And before you made this assignment?
A. Yes sir.
Q. Were you aware or not prior to the making of this assignment by the bank that the Moss Mercantile Company had paid Mr. Helmick the full face of that—(interrupted).

Objected to by counsel for plaintiff. Objections sustained. Exception allowed defendant.

Counsel for the defendant object to the introduction of this assignment in evidence at this time, first, for the reason that there is nothing in the pleadings showing any such assignment, nothing in the pleadings showing that Mr. King claims any interest in this matter now or at any time, and that this evidence is wholly immaterial for the reason that it does not tend to prove or disprove any of the issues in this case, second that this evidence is immaterial for the reason that there is nothing in the pleadings in this issue upon which to base any such testimony.

Objection overruled, exception allowed.

Assignment admitted in evidence, marked exhibit 8 plaintiff's proof and read to the jury and is in the following language:

47 "This Indenture, made this 29th day of March 1906, by and between the First National Bank of Payette Idaho, a corporation party of the first part, and Will R. King, of Ontario, Oregon party of the second part Witnesseth:

That whereas the party of the first part has recovered and obtained a certain judgment in the Circuit Court of Malheur County Oregon, (in March 1906) against William Miller for the sum of $3173.42, more or less with costs.

Now therefore the party of the first part in consideration of the sum of One Dollar, and other valuable considerations to it in hand paid, the receipt whereof is hereby acknowledged, does hereby bargain grant sell convey and assign, unto said Will R. King, all that certain judgment above referred to in favor of the party of the first part, wherein the said first party hereto, was plaintiff and one William Miller of Burns Oregon was defendant, to have and to hold the same unto him, the said Will R. King.

In witness whereof the said party of the first part hereunto sets its hand and seal this 29th day of March 1906.

[CORPORATE SEAL.] THE FIRST NATIONAL BANK OF PAYETTE, IDAHO.
GEO. V. LEIGHTON, *President.* [SEAL.]
P. A. DEVERS, *Cashier.* [SEAL.]

Executed in presence of:
A. J. BOEHMER.
J. F. HARADER.

At this time Counsel for plaintiff moves to strike out the testimony of this witness, that was brought out by counsel for defendant in order to qualify for the objection of the above paper, on the ground that any matter relating to the Moss Mercantile Company or to subsequent proceedings between them and Helmick are incompetent, irrelevant and immaterial.

Motion allowed and jury instructed not to consider the same. Exception allowed defendant.

Cross-examination by Judge RICHARDS:

At the time the Bank received the assignment I have mentioned from Mr. Helmick, I executed and delivered to Mr. Helmick a receipt for the assignment. (Paper here shown witness, being defendant's exhibit "A" for identification in former suit.)

That is the instrument.

As a part of the cross examination paper received in evidence, marked Exhibit A defendant's proof, and read to the jury and is in the following words:

48 "First National Bank of Payette, Idaho.

PAYETTE, IDAHO, *April 27th*, 1903.

Mr. Henry Helmick, Payette, Idaho.

DEAR SIR: The assignment of the judgment against O. W. Porter in Malheur County, Oregon, for $2775.00, and $120.00 costs we have entered for collection, proceeds of which when collected shall be subject to your order.

Yours Truly, P. A. DEVERS, *Cashier.*"

I think I made an entry of this upon the books of the bank. It was our custom relative to matters taken for collection by the Bank, to enter them upon the collection register. (Book here shown witness.) That is the collection Register used by the First National Bank of Payette Idaho, while I was its cashier. I find a record on pages 44 and 45 relative to this assignment, which entry reads as follows. "Of whom received, Henry Helmick, Drawee or debtor, O. W. Porter. Where payable, City. Date 4-27-03" The- follows a memorandum, "Assignment of judgment $2895.00" When the bank received money on a collection entered in that way, we usually show upon the register, that it has been paid if it receives the money, the amount of payment and the date of it, if it is paid in full, they merely note it. We have been in the practice of merely noting the date of the payment. If I ever received any thing on that collection I would have entered it in the register while cashier, unless overlooked. It was my intention, decidedly. There is nothing in the records of the Bank that I am aware of, showing any money received for that assignment.

Redirect examination by Col. WOOD:

At the time I executed this assignment on the part of the bank, I was its duly qualified and acting cashier. I severed my connection

with the First National Bank of Payette and retired from the business of cashier about the first of May 1906. I sold my interest in the Bank on the 14th of April previous and remained cashier
49 until about the 1st of May. After I learned that Mr. Moss had collected this money I consulted immediately our attorney, Mr. Smith, and took the matter up with him and Mr. King immediately; and about the same time, probably a day after, I made an agreement with Mr. Helmick and Mr. Lauer in regard to the expenses and attorneys' fees. Prior to this we had contracted with Mr. Smith to pay him, I think, $250.00 to take care of the case in the District Court. I entered in to that agreement with Mr. King and Mr. Smith jointly. About a week after I learned that Mr. Miller had collected the money; and I think not probably more than one or two days. In this matter I acted for the Bank. None of these proceedings were for me personally. I was representing the Bank entirely.

Recross-examination by Mr. RICHARDS:

I made an agreement with Mr. Lauer and Mr. Helmick to pay the expenses, in writing (paper shown witness). That is the agreement of Henry Helmick and J. A. Lauer to the Bank to take care of the expenses and attorneys' fees in the case being prosecuted by the Bank against Wm. Miller for the collection of that judgment.

Paper was admitted in evidence, marked Exhibit "B" Defendant's proof, and read to the jury, and is in the following words:

"PAYETTE, IDAHO, *July* 13, 1903.

To the First National Bank, Payette, Idaho:

In the matter of the proceedings against Wm. Miller and, *or*, others for the recovery of the proceeds of the judgment rendered in the Circuit Court of Malheur County, Oregon, in favor Henry Helmick and ag-inst O. W. Porter, the undersigned hereby promise and agree to and with said First National Bank to reimburse it for any expense it may incur in connection with such proceedings; either for attorney fees or otherwise. We the undersigned parties being interested in result of such proceedings.

HENRY HELMICK.
J. A. LAUER."

I agreed to pay Judge Smith, I think, $250.00. I am not certain. As Judge Smith has to withdraw from the case, the Bank finally paid him $25.00. I charged it up to Lauer, as expenses of that account. Eventually it went to Lauer and the Bank
50 was reimbursed for all the money expended. Mr. King was attorney for the Bank after Mr. Smith withdrew. I don't recollect that which we paid Mr. King. It was all of record. The Bank agreed to pay him, but I don't recollect how much. I am not sure that I notified Mr. King that the Bank would not be responsible for any of the fees in the case.

51 Q. Well, Why did you need that order, if you already had one?

A. Well, he was a lame man in the suit. He was and always has been anxious to get as much protection in the suit as he can. I always felt I had an ample order, but it was a question of proving it. I do not think I got the order. I did not ask Mr. Helmick for it. I never discovered in our Bank account any lack of balance by reason of any payment having been made in this Helmick collection or money paid out. The Bank never received anything by way of collection on that judgment. Never go- a cent from Mr. King for that assignment when I handed it to him, and I never paid a cent for it when I got it.

Redirect by Col. WOOD:

Q. I will ask you whether or not Mr. Helmick authorized you to pay over when collected, any part of this judgment to Lauer, and if so what was said and where and when?

Objected to as lea-ing, calling for a conclusion of the witness, and as incompetent, irrelevant, and immaterial. Objection overruled. Exception allowed.

A. Mr. Helmick at the time we drew up, and prior to that time, was there with Mr. Lauer, and in a conversation the amount due Mr. Lauer was specified and noted, and he authorized me specifically to pay Lauer out of the proceeds of the judgment but not a cent to anybody else. After the assignment was filed, the matter came up again in conversation and practically the same thing was repeated, that he wanted Lauer paid out of the proceeds of the judgment, but not a cent to anybody else. I agreed to this on behalf of the Bank. There was one suit brought in this matter by the First National Bank of Payette against Miller, and an injunction suit brought by the Moss Mercantile Company against the Bank, and this is *are* trial of the case of the Bank vs. Miller. I would like to add that

52 when I arranged with Judge Smith he made the proposal to me that he would take it up for, I think, $150.00 but that it would be better if we would employ another attorney and suggested Mr. King, and King proposed that they would take it through the District Court for $250.00, the two of them, and later on we arranged the matter on that basis, and Mr. Smith was afterwards elected Judge of the District of Canyon County and withdrew from the case and I paid him simply as a concession of his, $25.00. I do not recollect what we paid Mr. King but it might be a hundred dollars. I have a recollection, not very distinct, that Mr. Smith was to receive $150.00 of the $250.00 and $100.00 to go to Mr King. I had reference to hiring them to try the case in the lower Court.

Q. Go ahead.

A. After the matter was gotten along as these letters would indicate, I felt that the Bank should be relieved from the continuing responsibility it was assuming on account of Mr. Lauer as he was

not responsible himself, he should make arrangements direct with Mr. King to take care of these things.

Q. Make any explanation that the Court and counsel will permit.

A. Feeling at all times that we were responsible to Mr. Lauer, (interrupted)——

Counsel for defendant moves to strike out the above testimony. Objection overruled. Exception allowed.

Witness continues: Feeling, as I say, that we were legally responsible to Mr. Lauer, I did not want to say so to him any further than was necessary, and when I spoke of the collection to Mr. King I simply spoke of it in that light, notwithstanding that I believed we were responsible to Mr. Lauer to the extent of his claim in the event we neglected to prosecute the suit.

Counsel for defendant moves to strike out the above testimony on the ground that it is wholly the belief of the witness and not the fact. Motion overruled. Exception allowed.

Recross-examination by Judge RICHARDS:

53 When I took that assignment I did not understand the Bank would be responsible for any costs, attorneys' fees, or expenses incident to the collection of the judgment, but afterwards when I entered into the arrangement with Mr. Lauer and Mr. Helmick jointly they understood in that written agreement that they would be responsible for the expenses, and Lauer has reimbursed the Bank for all its expenses and I am not sure that the Bank has been out a dollar.

Redirect by Col. WOOD:

I can't recollect the exact conver-ation between Lauer and Helmick on the one side and myself, and between me and the people I hired, as to the responsibility of the Bank, but as near as I can remember it Mr. Smith told us he would take it up for the Bank and arrange the fee with the Bank. Mr. Lauer and Mr. Helmick were not to appear in the case at all. They were not present at the time, nor when I agreed with Mr. King. All these expenses were paid out by the Bank before the Bank called on Mr. Lauer for reimbursement.

Recross-examination by Judge RICHARDS:

Mr. Lauer has reimbursed the Bank so far as I know, and I am not aware that the Bank is out a dollar at the present time.

Redirect examination by Col. WOOD:

I can't recollect the dates the reimbursements were made. It was after this suit had been tried; after they had been up to the Supreme Court, I think.

WILL R. KING, being called and duly sworn as a witness on behalf of the defendant, testified as follows:

I live at Ontario. I am an attorney at law by profession. I am a Commissioner of the Supreme Court and assumed my office on the 26th day of February, 1907.

Q. I show you a paper executed on the 29th day of March, 1907, to yourself as attorney of the First National Bank of Payette, and ask you whether you received that paper?

A. I did, yes sir. That is a copy of the instrument I
54 received.

Q. Now, I will ask you to state under what circumstances you received it and where and when?

A. I received it at the Ba-k (interrupted)——

Objected to as incompetent and not the best evidence the instrument itself being the best evidence. Objection overruled. Exception allowed.

Witness continues: I received the instrument at the First National bank (interrupted)——

Counsel for defendant object to any testimony on this matter for the reason that there is no pleading in this case on which any such testimony could be based, and no pleading showing that Mr. King has any interest in this case at *the* this time, or any other time; therefore, it is irrelevant and immaterial evidence. Objection overruled. Exception allowed.

Witness continues: I received the instrument at the First National Bank at Payette, and the instrument was made at the request of Mr. Helmick and Mr. Lauer. Mr. Lauer was present, I think. Mr. Helmick was present and the parties who witnessed the instrument. There were present at the Notary Public's. Mr. Lauer and Mr. Helmick came to Ontario and requested me to take this assignment and stated as one of thier reasons, that Mr. Moss of the Moss Mercantile Company intended to buy up the stock of the Bank and thereby come into possession of the judgment and defraud Mr. Helmick out of the money, and to head that off, they wanted me to take the assignment and pay the amount due Mr. Lauer amounting to nineteen hundred and some odd dollars, and to pay the expenses of the litigation out of it, and pay my fees when the case was tried, and pay the rest to Mr. Helmick, whatever was left, which I agreed to. Mr. Helmick and Mr. Lauer was present on one occasion and Mr. Devers, I think, on the other. Mr. Helmick gave me a written order for the distribution of this fund.

55 Q. I show you a paper which is purported to have been executed on March 29th, 1906, and signed, or what purports to have been signed, by Henry Helmick, and I will ask you whether you are familiar with the signature of Henry Helmick?

A. I am.

Q. Have you seen him write?

A. Yes, sir.

Q. Is that his signature?
A. Yes, sir, I saw him sign it.
Q. Did you receive that paper from him?
A. I did.

The same is here offered in evidence. Objected to at this time for the reason that the evidence they have introduced here shows that Mr. Helmick had already parted with all his interest and that he had nothing to assign, and it is therefore incompetent testimony. Objection overruled. Exception allowed.

The same is here received in evidence, Marked Exhibit "9" and read to the jury, and is as follows:

"To Will R. King, as Assignee of First National Bank of Payette, Idaho:

Whereas heretofore in the Circuit Court of the State of Oregon, for Malheur County, I obtained a certain judgment, as plaintiff against O. W. Porter as defendant, and

Whereas, I heretofore assigned said judgment to the First National Bank of Payette, Idaho, for a valuable consideration, and

Whereas, certain litigation afterwards arose between said First National Bank and Moss Mercantile Company of Payette, Idaho, and William Miller, respectively, and whereas, you the First National Bank obtained a judgment in the said Court for the sum of $3173.42,

Now therefore, I, as beneficiary of said Bank in said judgment, hereby direct that you, Will R. King, as assignee of said First National Bank of Payete, Idaho, pay to James A. Lauer of Payette, Idaho, the sum of $1943.00, and that the balance of said amount be paid to Frank Graham of Emmett, Idaho, for my benefit.

In witness whereof, I her-unto set my hand and seal this — day of March, 1906.

HENRY HELMICK. [SEAL.]

In addition to the above pay First National Bank of Payette, Idaho, One Hundred Dollars: balance pay to said Frank Graham.

HENRY HELMICK.

March 29, 1906."

Q. Is that the actual date on which the paper was executed?
A. Yes, sir.
Q. Did the First National Bank know of and consent to this?
56 A. It did.

Counsel for plaintiff here offers in evidence a certified copy of the order of the Supreme Court, substituting Mr. King as plaintiff.

Objected to for the reason that there is no pleading in this case on which any such testimony can be based, therefore it is incompetent and immaterial testimony.

Objection overruled.

Exception allowed.

The same was received in evidence, Marked Exhibit "10" Plaintiff's proof.

About five days before this action was filed, I was approached by Mr. Smith of Caldwell to secure my legal services in these matters on behalf of the First National Bank of Payette, Idaho, in relation to the collection of this money from Miller. He came down and told me the situation and asked me what I would charge to go into the case, and if I remember rightly it was either agreed of a fee of $250.00 or $300.00, I am not certain which, for trying the case in the Circuit Court. No arrangement was made, as I remember, concerning any fee in the event of an appeal, but we were to charge that much in the Circuit Court and the Bank was to pay the fees. Later, I think the next day, Mr. Devers came over and talked it over, and we agreed on that basis. I think Judge Smith came with him. That the Bank was to pay $250.00, probably $300.00, to institute the case in the Circuit Court. We were each to receive one-half, but I am not certain about that. I have never released the Bank from that obligation. The Bank paid it, paid us that $250.00, that is it paid us the entire fee for the Circuit Court; that was paid in full, I think, before the Moss—but I will not be certain—before the Moss case was started. Anyway we were paid that amount by the Bank whatever they agreed to pay us; that is, I was paid my portion of it; I would not be so certain about what amount was paid Judge Smith, but as I remember it at the time we were
57 employed, we were paid $100.00 and I think that Judge Smith was paid $25.00 afterwards. I was attorney in the case of the Moss Mercantile Company against the Bank after this action was filed. The Moss Mercantile Company brought a suit in equity and enjoined the Bank from proceeding against Miller. We appealed to the Supreme Court and the Supreme Court reversed and dismissed the injunction proceedings, and then we tried the case of the Bank against Miller; and the Moss Mercantile case was a separate and distinct suit so far as my agreement as to attorney's fees was concerned. We did not anticipate anything of that kind and no arrangement was made in reference to fees at that time. At the time I took the instruction in writing for the allotment of the proceeds of this assignment, I agreed to it, and the agreement was then made in reference to additional fees for carrying on this case.

Q. Have you any interest in the assignment then?

A. I have. I have about $500.00 worth.

Cross-examination by Judge RICHARDS:

Q. Mr. King, you knew at the trial of the case of the Moss Mercantile Company against the First National Bank, that the Bank was not to be responsible for any of these fees, did you not?

A. No, sir, the Bank was to be responsible.

Q. Didn't you introduce in evidence Defendant's Exhibit "B" in that trial?

A. I don't know until I see it.

Q. (Paper referred to handed to witness.) Did you introduce it?

A. Yes sir, I introsuced that.

Q. Then you knew who was to be responsible from that, did you not?

A. Yes, sir.

Q. And you wrote those letters "that you understood the Bank was not to be responsible," you understood what you wrote
58 did you?

A. I didn't write any such letters.

Q. You didn't?

A. I said the Bank would not be responsible for the fees we had agreed upon, but so far as the other case is concerned the fe-s are just as I stated, and that letter—interrupted——

Q. In the letter you wrote to the Bank you stated that Louer and Helmick were to be responsible, did you not?

A. That is they were security to the Bank.

Q. Did you say you "understood they were to be responsible for the attorney fees?"

A. What attorney fees?

Q. For the attorney fees in this proceedings?

A. No, sir, I didn't say that. I had reference to the attorney'e fees in the Moss Mercantile case, and that was a different case.

Q. Never mind what you had reference to, I am asking you what you said?

A. Well, I say I didn't say it.

Q. Now, Mr. King, did you not write to Mr. Devers stating: "I believe Helmick agreed to pay all necessary expenses."

A. I said that, yes sir.

Q. Was that -rue?

A. That waw true as to the expense in that case, but had no reference to the expenses of Helmick agreeing to pay me anything.

Q. "*Waht* did you say from that time on?"

A. That had reference to the attorney fees that might be incurred in the appealed case and the addition- cost for retr-ing the case, and in the event it went to the Supreme Court later on again, that from that time on Helmick and Lauer were to stand these fees. It was to come out of the judgmen-.

Q. You *kwne* they had made a written contract to stand the expenses and attorney fees in the matter?

59 A. They had not with me, no sir.

Q. You knew that was in existence?

A. I knew they had agreed with the Ba-k sometime after this suit was started, or about that time.

Q. And you introduced it in evidence?

A. Certainly; but that didn't have any reference to any dealings I had with the Bank.

Q. (Paper shown witness.) State what that is, Mr. King?

A. It is a written instrument signed by some one who purports to be Henry Helmick.

Q. You know Mr. Helmick's signature, do you?

A. Yes, sir.

Q. Is that it?

A. It looks very much like it.
Q. You think it is, don't you?
A. That is my opinion.

Instrument marked Exhibit "H" for identification Defendant's Proof.

Q. You knew that that instrument was out and in existence at the time you took the assignment?
A. Yes, sir, I knew all about that instrument.

Paper marked Exhibit "H" for identification was offered in evidence.

Objected to on the ground that it is irrelevant and immaterial. Objection sustained, and exception is allowed.

This instrument is in the words following:

"PAYETTE, IDAHO, *Oct.* 30, 1900.

Mr. O. W. Porter:

You are hereby authorized and directed to pay over to Moss Mercantile Company, Limited, all moneys which you are now owing me."

HENRY HELMICK."

Q. Now, at the time you took that assignment, you know that Mr. Moss or the Moss Mercantile Company had paid the entire face and consideration of that Porter judgment di- you not?

Objected to as irrelevant, incompetent and immaterial as
60 is now stands. Objection sustained. Exception allowed.

Q. You knew at the time you took that assignment that this instrument, which I now hand you a certified copy of (her- hands witness a paper), you knew that that had been filed for record in the office of the County Clerk of this County?
A. Yes, sir.
Q. You may state generally what it is, Mr. King, that paper?
A. I don't know that I am able to name it.
Q. Well, will you try to name it?
By Col. WOOD: Just the legal name of it, not what it purports to be.

Judge RICHARDS continues:

Q. You knew what it purpor*st* to be, as a lawyer, do you not, Mr. King?

Objected to as incompetent, irrelevant and immaterial. Objection sustained.

Q. I ask if you knew—interrupted——
A. I knew all about that, yes sir, several times.

Paper marked Exhibit "I" for identification.

Q. You know as a matter of fact that Mr. Helmick had revoked that assignment, I will ask you Mr. King; did you know at the time

you took the assignment from the Bank, which you claim to have taken, that Mr. Helmick had revoked the assignment which he had given the Bank by a written instrument?

Objected to as irrelevant, immaterial and incompetent. Objection sustained. Exception allowed.

Q. Did you know at the time you took that assignment and for sometime prior thereto, that the Moss Mercantile Company had made full settlement with Mr. Helmick?

Objected to as irrelevant, incompetent and immaterial. Objection sustained. Exception allowed.

Witness excused.

Plaintiff here rests in chief.

61 Counsel here moves the court at this time to take the question from the jury and instruct them to find a verdict for the defendant, for the following reasons:

First. That the evidence shows here that Mr. King is not the plaintiff and has no legal right to appear here as plaintiff;

Second. That the evidence shows that the party from whom he received the assignment took this assignment from Henry Helmick for the mere purpose of collection without any interest in it whatever, and agreed in writing with Mr. Helmick that when collected the Bank would turn this money over to the order of Mr. Helmick.

Third. The evidence knew that Mr. King knew about these things;

Fourth. For the reason that there is no pleading here upon which any assignment to Mr. King could be based;

Fifth. For the reason that Mr. King has paid no consideration of any kind whatever for this assignment;

Sixth. For the reason that the Bank paid no consideration whatever for that assignment to it, all of which Mr. King knew; and an assignment of that character in trust for the assignor is void under the Oregon Statute;

Seventh. For the reason that the evidence shows that when Mr. Knight took this assignment he was not to receive any compensation from the Bank, but understood he was to receive his compensation for any services rendered from Lauer and Helmick;

And for the further reason that it appears to the court in the record that the Bank protested against further consideration or trial of this case for the reason that it had made a full settlement with Mr. Helmick in this matter, and Mr. Miller asked that the case be dismissed, in which the defendant Bank joined.

Motion overruled.

Exception allowed.

62 Whereupon, A. B. Moss being called and sworn as a witness on behalf of the defendant, testified as follows:

Direct examination by Judge RICHARDS:

I reside at Payette. Am engaged in merchandise, farm a little, and other things.

Q. Paper shown to witness—You may state what that is, Mr. Moss?

A. It is a note.

Q. Signed by whom?

A. Henry Helmick and Etta Helmick.

Counsel here offers in evidence the note referred to, the same being dated October 17, 1902, for $2768.33, and signed Henry Helmick and Etta Helmick. Counsel states it is for the purpose of showing an indebtedness from Mr. Helmick to the Moss Mercantile Company at that time.

Objected to as irrelevant and immaterial in this case. Objection sustained. Exception allowed.

Q. (Another paper shown witness.) Mr. Moss you may look at this instrument shown you, and state what it is?

A. A note.

Q. From whom?

A. Henry Helmick.

Q. To whom?

A. To A. B. Moss and brother.

Q. Who was the owner of that note at that time; the note dated January 26, 1900, for $600.00, and signed Henry Helmick and endorsed on the back A. B. Moss & Brother; to whom was that note endorsed, Mr. Moss?

A. I can't te-l you until I see the note.

Q. It is just endorsed in blank.

A. To Moss Mercantile Company, I think.

This note was here offered in evidence to show at that time Mr. Helmick was indebted to the Moss Mercantile Company.

Objected to as irrelevant and immaterial in this case
63 Objection sustained. Exception allowed.

Counsel for defendant her- asks to be allowed to have these two notes marked as exhibits, which is allowed. The same are here marked respectively as "J" and "K." Defendant's Proof.

Q. (Paper shown witness.) You may state generally what that is?

A. An order given by Henry Helmick on O. W. Porter to Moss Mercantile Company, Limited, dated Payette, Idaho, October 30, 1900, addressed to O. W. Porter, and signed Henry Helmick.

The same is here offered in evidence. Objected to as irrelevant and immaterial. Objection sustained. Exception allowed.

The same is here marked Exhibit "L" Defendant's Proof.

Q. Mr. Moss, I wish you would state whether or not at the time this order I have just asked you about was given Mr. Devers, cashier of the Bank, knew anything about the order?

Objected to as irrelevant and immaterial. Objection sustained. Exception allowed.

Q. Who prepared that order, Mr. Moss?

Objected to as irrelevant and immaterial. Objection sustained. Exception allowed.

Q. Did Mr. Devers prepare it?

Objected to as irrelevant and immaterial. Objection sustained. Exception allowed.

Q. I wish you would state, Mr. Moss, what, if any, knowledge Mr. Devers had at that time of the order, and subsequently, as to whether Mr. Helmick was indebted to the Moss Mercantile Company?

Objected to as irrelevant, incompetent and immaterial. Objection sustained. Exception allowed.

Q. Mr. Moss, I wish you would state what, if any, knowledge Mr. Devers, as cashier of the Bank, had at the time he took the assignment of the Helmick judgment against Porter, relative to the
64 indebtedness from Mr. Helmick to the Moss Mercantile Company?

Objected to as immaterial and irrelevant. Objection sustained. Exception allowed.

Q. (Paper shown witness.) State generally what th-t is, Mr. Moss?

A. It is a release.

Q. From whom?

A. The First National Bank, of Payette, Idaho.

Q. To whom?

A. William Miller.

The same was marked Exhibit "M" Defendant's proof, and offered in evidence.

Objected as irrelevant and immaterial. Objection sustained. Exception allowed.

Q. Mr. Moss, I wish you would state what, if any, knowledge Mr. King had at the time he claimed to have taken an assignment of this Miller judgment from the First National Bank to himself, as to any settlement having been made between yourself and Mr. Helmick in full?

Objected to as irrelevant, incompetent and immaterial. Objection sustained. Exception allowed.

Q. What, if any, settlement had the Moss Mercantile Company made with or between itself and Henry Helmick prior to the time of the assignment of the Miller -udgment was made to Mr. King?

Objected to as irrelevant and immaterial. Objection sustained. Exception allowed.

Q. (Witness shown paper.) State what that is generally, Mr. Moss?

A. It is an assignment.

Q. How is that?

A. An assignment.

Q. What does it purport to be, not what it is?
A. A revocation.

65 The same is marked Exhibit "N" Defendant's Proof, for identification.

Q. I now show you this Exhibit "N" for identification and ask you to state generally what this instrument purports to be?
A. A revocation.

Such instrument admitted in evidence, marked Exhibit "N" Defendant's Proof and read to the jury and is in the following words:

"Henry Helmick
to
First National Bank of Payette.

Know all men by these presents, That I, Henry Helmick *fo* the town of Payette, Canyon County, State of Idaho, having on the — day of June, 1893, executed what purported to be a power of attorney, cons-ituting the First National Bank of Payette, Idaho, my attorney for the purpose of collecting a certain judgment in my favor whi-h was duly recover-d in the Circuit Court of the State of Oregon, for Malheur County against one O. W. Porter, for the sum of $2775.00 and $120.00 costs, and interest.

Now, Therefore, I, the said Henry Helmick for divers good causes and consideration- have revoked, countermanded, annul-ed and made void, and by these presents do revoke, countermand annul and make void, the said power of attorney, and all authority thereby given to the said First National Bank of Payette, Idaho, or the officers thereof.

In witness whereof, I have hereunto set my hand and affixed my seal this 25th day of September A. D. 1903.

HENRY HELMICK. [SEAL.]

In presence of:
A. N. SOLISS.
WM. MILLER.

(Duly acknowledged.)
(Filed for record Sept. 29th, 1903.)"

Q. (Paper shown witness.) You may state generally what that purports to be?

Counsel for plaintiff objects to the question, asking what the paper purports to be, as not the proper way to identify a paper.
Objection sustained. Exception allowed.

Q. You may state the date of that instrument, Mr. Moss?
A. 28th of September, 1903.
Q. By whom was it signed?
A. It is signed by the Moss Mercantile Company, and
66 A. B. Moss its President, and Henry Helmick.

Suc- paper is here marked Exhibit "O" for identification, Defendant's Proof, and offered in evi-ence.

Objected to on the ground that it is irrelevant and immaterial in this particular case. Objection sustained. Exception allowed.

This instrument is in the following words:

"This Agreement made and entered into this 28th day of September A. D. 1903, by and between the Moss Mercantile Company of Payette, State of Idaho, by A. B. Moss its duly authorized agent the party of the first part and Henry Helmick of the same place the party of the second part, witnesseth: That for and in consideration of the promises and agreements of the said party of the second part hereinafter set forth on his part to be kept and performed, the said party of the first part agrees to make and execute its certified check for the sum of Fourteen hundred ($1400.00) dollars payable to Ira W. Kenward, Attorney at Law, of Payette, Idaho, and place same in escrow in the First National Bank of Ontario, Malheur County, State of Oregon, pending the final determination of an action now pending — the Circuit Court of the State of Oregon, for Malheur County, wherein the First National Nank of Payette, Idaho, is plaintiff and Wm. Miller of Ontario, Oregon, is the defendant and any suit growing out of the *casue* of said action which is for the recovery of money collected by said Miller on a judgment in favor of said Helmick and against one O. W. Porter, for the sum of $2775.00 and costs and interest and which said sum was paid over to the party of the first part, herein the said Moss Mercantile Company; the said certified check so placed in escrow to be turned over to the said Ira W. Kenward in the event said action or suit is determined adversely to said First National Bank of Payette, Idaho, otherwise then said check to be turned over to William Miller to be applied by him on any judgment or decree said Bank may recover against him in said suit or action; then the said party of the first part further agree*w* to pay to the said party of the second part upon the execution of th-s agreement the sum of Five hundred ($500.00) dolla-s lawful money of the U. S. the receipt whereof is hereby acknowledged by the said party of the second part; and also turn over to the said party of the second part any and all notes which it now hold- against the said party of the second part and cancel and satisfy all mortgages which it now holds as liens against the property of the party of the second part, including the note to Moss Brothers covering purchase price of lots.

And the said party of the second part promise- and agrees that he and his wife will immediately execute and deliver to the said party of the first part a quit claim deed conveying to the party of the first part all their right, title and interest in and to lots Numbered One, Two and three of Block Numbered thirteen of Masters' Addition to the town of Payette, State of Idaho, and will also execute and deliver to the said party of the first part a Bill of Sale thereof to all the personal property, goods, chattels and live stock of the party of the second part of whatever name or nature and wheresoever situate, save and except the household goods and personal effects of the party of the second part; and the said party of the second part fur-

ther agrees to rescind and revoke the authority heretofore given by him to the First National Bank of Payette, Idaho, for the col-
67 lection of that certain judgment recovered by the party of the second part herein in the Circuit Court of the State of Oregon for Malheur County against one O. W. Porter and will testify in said action or any action, *suti* or proceedin-s growing out of the collection of said judgment that the authority so given said First National Bank of Payette, State of Idaho, was without consideration and for the purpose of defrauding the said Moss Mercantile Company and the stockholders thereof; and that long prior to said assignment of said judgment to said Bank, that he, the said Helmick had duly assigned said judgment and the proceeds thereof to the said Moss Mercantile Company all of which was well known to the First National Bank of Payette, Idaho, and all of which is absolutely true; and that he will be and appear at Court to so testify to the truth hereof and make any and all affidavits necessary thereto and do all in his power to assist in defeating said Bank in its attempt to collect said money or any thereof.

It is further understood by and between the parties hereto that the satisfaction of such mortgages as are now held by the said Moss Mercantile Company is to be made at the request of Ira W. Kenward, attorney of the said party of the second part herein, and in the event that said — or any action, suit or proceeding is final-y determined adversely to said Miller or the Moss Mercantile Company then in that event the said Moss Mercantile Company is authorized to collect from the said First National Bank of Payette, Idaho, all moneys coming to the said Helmick and to account to Ira W. Kenward therefor, to wit:—The sum collected less the sum of five hundred dollars paid hereon to said Helmick by the said Moss Mercantile Company.

And the said party of the second part further agrees to turn over, endorse and deliver to the said party of the first part all documents, papers and orders now in his possession or of whic- he has control which throw any light upon or have any bearing on or pertain to the subject or subjects of the controversy between the said Bank and any of the parties hereto and make and execute and deliver any and all orders affidavits and depositions which may be necessary to the interests of the said party of the first part herein.

In witness whereof the said parties hereto have set their hands to th-se presents in duplicate this 28th day of Sept., 1903.

MOSS MERCANTILE CO.,
By A. B. MOSS, *Pres't.*
A. B. MOSS.
HENRY HELMICK."

In the presence of:

—— ——.

Q. (Paper *w*hown witness.) You may state the dat- of that paper, Mr. Moss?

A. September 29th, 1903.

Q. To whom addressed?

A. Ira W. Kenward.
Q. Signed by whom?
A. Henry Helmick.
Q. Anyone else?
A. Ira W. Kenward, as attorney.

Paper is here marked Exhibit "P" for identification, De-
68 fendant's Proof.

Q. Mr. Moss, I wish you would state, if you know, how much you paid Mr. Helmick for the Porter judgment?

Objected to as irrelevant, incompetent and immaterial. Objection sustained. Exception allowed.

Witness excused.

Mrs. ETTA HELMICK, being called and duly sworn as a witness in behalf of defendant, testified as follows:

Esther Helmick is my right name. Etta is the name there. Henry Helmick was formerly my husband. The same Helmick whose name has been mentioned there. He is not my husband now.

Paper marked Exhibit "P" for identification Defendant's Proof, is here offered in evidence.

Objected to as irrelevant and immaterial. Objection sustained. Exception taken.

This paper is in the following words:

"PAYETTE, IDAHO, *Sept.* 29, 1903.

Ira W. Kenward, Esq., Payette, Idaho.

DEAR SIR: This is to certify that I have this day for value received, assigned and transferred to Etta Helmick, my wife, all my rights, title and interest in and to any money due me or hereafter to become due me, under and by virtue of a one certain contract and agreement & executed by myself and the Moss Mercantile Co. and A. B. Moss.

And I hereby direct you to pay all money received by you under and by virtue of said contract to be the order of the said Etta Helmick, less amount coming to you as attorney fees.

HENRY HELMICK.

(Duly accepted.)

Q. How many children have you now living by Mr. Helmick?

Objected to as incompetent, irrelevant and immaterial. Objection sustained.

Q. Who supports those children now?

Objected to as incompetent, irrelevant and immaterial. Objection sustained.

Q. You may look at Defendant's Proof Exhibit "P" for identification, and I will ask you why Mr. Helmick gave you that instrument, marked Exhibit "P" Defendant's Proof?

Objected to as irrelevant and immaterial. Objection sus-
69 tained. Exception allowed.

Q. State what if anything, you know about the settlement being made between Moss Mercantile Company and Mr. Helmick and yourself?

Counsel for plaintff here objects to this question on the ground that it is incompetent, irrelevant and immaterial. Objection sustained. Exception allowed.

A. I was present at one time when Mr. Lauer, Mr. Dever and Mr. Helmick were discussing the question of the assignment from my husband of the Porter judgment to the First National Bank of Payette.

Q. I wish you would state that conversation?

—. ——.

By Col. WOOD:

Q. Do you know when the assignment was made from you- husband to the Bank?

A. I was at the Bank when it was made. I cannot tell you what date. This conversation I had in relation to that date was sometime in the afternoon when we were there at the Bank I was with him. He made the assignment at the same time. It was the same time he ma-e and delivered the assignment.

Judge RICHARDS continues:

Q. You may state that conversation.

A. They said they would charge nothing for collecting this money from O. W. Porter; the collection of the Porter judgment. Exhibit "A" was given that day, I remember that paper. That is the one I saw at that time; I remember it well.

Q. What, if anything, was said that day relative to why the Bank wanted that assignment?

A. After he had signed it they said they wanted it because they di-n't want Moss to get hold of it; that they would not charge anything for collecting it, because, I understand, they had a grudge against the Bank; it was the same day: I told Mr. Helmick we must take it out of their hands. Mr. Lauer didn't claim anything
70 whatever, and Mr. Helmick told me he was doing it as a friend. Mr, Helmick said it was in the presence of these other people; in the presence of Lauer and Mr. Devers. Mr. Helmick *siad* that Lauer was doin*t* it as a friend of his.

Q. Was there anything said by Mr. Lauer to you afterwards relative to having Mr. Helmick sign an order?

A. Yes, sir, he wanted him to sign an order.

Q. What was said by Mr. Lauer relative to wanting that order?

A. He wanted Mr. Helmick to sign an*d* order and I says "What do you want with the order?" and he says "only as an incentive to work for," and I insisted upon him showing me the order.

Q. Was there anything said relative to that that was necessary in order to institute proceedings?

Objected to on the ground that it is putting the answer in the witness's mouth, and that it is incompetent, irrelevant and immaterial. Objection sustained. Exception allowed.

Q. Did Mr. Helmick make any such order?

Objected to on the ground that it is irrelevant, immaterial and incompetent. Objection sustained. Exception allowed.

Q. Was there any reason given to you by Mr. Lauer or Mr. Devers why such an order was necessary?

Objected to as irrelevant, incompetent and immaterial. Objection sustained. Exception allowed.

Q. What, if anything, was paid by the Bank at that time or by anyone for the Bank, for that assignment to the Bank from Helmick, if you know?

A. Nothing.

Q. Was the dollar that was mentioned in that assignment or any part of it, paid at that time?

A. There was nothing paid.

Cross-examination by Col. WOOD:

71 It was after the assignment that Mr. Lauer spoke to me about getting an order from Helmick, and just Mr. Lauer and me alone; and he showed me the order; that was the order referred to.

Q. It had already been given?

A. It had already been given, Yes sir.

Counsel for plaintiff her- moves to strike out that portion of the witness's testimony relating to the conversat-on between her and Lauer about the order.. on the ground that it is irrelevant and immaterial. Motion allowed; and jury instructed not to consider the same in deliberating on their verdict. Exception allowed, defendant.

Redirect examination by Judge RICHARDS:

Q. (Paper shown witness.) I wish you would give the date, Mrs. Helmick, that is given on that paper?

A. August 5th, 1903.

Q. To whom addressed?

A. The First National Bank of Payette, Idaho.

Q. Is it signed or not?

A. No, sir.

(The paper is here marked Exhibit "Q" for identification, Defendant's Proof.)

Q. Is that the order you mentioned?

A. Yes, sir.

Exhibit "Q" for identification here offered in evidence.

Objected to as irrelevant, immaterial and incompetent. Objection sustained and Exception allowed.

This paper is in the following words:

"CALDWELL, IDAHO, *Aug. 5th*, 1903.

To The First National Bank, Payette, Idaho.

GENTLEMEN: You are hereby authorized and directed to pay J. A. Lauer of Payette, Idaho, the sum of Six Hundred and seventy nine dollars and fifteen cents out of the proceeds of the judgment in the case of Helmick vs. Porter, which was assigned to you for collection.

This was my understanding at the time the assignment was made to you, but Mr. Lauer requested me to make it in writing.

72 This of course is subject to the costs and expenses of collecting the judgment.

Yours truly,

——— ———."

Witness continues: The reason given for wanting that order Exhibit "Q" was an incentive for them to draw this money after they had made this assignment to the Bank. I had no conversation with Mr. Devers about it.

Witness excused.

IRA W. KENWARD being called, was duly sworn as a witness on behalf of defendant, and testified as follows:

My name is Ira Kenward. I reside at Payette, Idaho. I am attorney for Mrs. Helmick in this matter.

Q. (Paper shown witness.) You may give the date of that?

A. It is dated Payette, Idaho, Sept. 30th, 1903.

Q. To whom addressed, if any address?

A. It is not addressed.

Q. By whom signed?

A. It is signed by M. F. Albert, Cashi-r, and was delivered to me by Mr. Albert.

Paper is here marked Exhibit "R" for identification, Defendant's Proof.

Q. Were you, or not, acting for Mrs. Helmick's when defendant's Exhibit "O" was executed?

A. That was my understanding.

Q. Were you present at that time?

A. Yes, sir.

Q. What relation has Defendant's Exhibit "R" for identification to Defendant's Exhibit "O"?

A. They relate to the same matter.

Counsel for plaintiff moves to strike out the last above answer Motion allowed. Jury instructed not to consider the same. Exception allowed.

Q. Do these two exhibits relate to the same matter and transaction?

73 A. Yes, sir.

Exhibit "R" for identification is here offered in evidence,

Objected on the same ground as before, that it is not a transaction between any of the parties to this suit or any one competent to bind the parties to this action, and it is executed between strangers at a date long after the commencement of this action, and is, therefore, irrelevant and immaterial.

Q. Did Mr. Helmick consent to this instrument marked Exhibit "R" for identification?

Objected to as irrelevant and immaterial. Objection both as to the evidence and the last above question sustained. Exception allowed both as to the question and offer.

Paper marked Exhibit "R" for identification is in the following words:

"PAYETTE, IDAHO, *Sept. 30th*, 1903.

"In accordance with the instructions to the First National Bank of Ontario, Oregon, a copy of which is hereunto attac-ed, I have cas*ue*d to be made and executed, forwarded to said First National Bank, to be by them held in escrow, in accordance with said instructions, certificate of deposit No. 357 for $1400.00.

M. F. ALBERT, *Cashier.*"

Q. (Paper shown witness.) You may look at this paper and give the date and address and the signature to that?

A. It is marked "Valuable" and is d*ta*ed "Payette, Idaho, September 20th, 1903" addressed to the First National Bank, Ontario, Oregon, and signed by the Bank of Commerce, by M. F. Albert, cashier, and purports to be a copy of some letter addressed to them.

Paper is her- marked Exhibit "S" for identification, defendant's proof.

Q. I want to know if this Exhibit "S" for identification is connected in any way with defendant's proof Exhibit "O" for identification, and Defendant's Exhibit "R" for identification; and if so, I want to simply know if they are related to the s-me transaction?

A. They do.

74 Exhibit "S" for identification, Defendant's proof, here offered in evidence. Objected to on the ground that it is irrelevant and immaterial. Objection sustained. Exception allowed. Witness excused.

M. F. ALBERT, being called and duly sworn as a witness on behalf of defendant, testified as follows:

Direct examination by Judge RICH-RDS:

My name i*f* M. F. Albert. I am cashier of the First National Bank of Payette, Idaho; the same Bank mentioned in this suit; the Bank of which Mr. Devers was formerly cashier. I am in charge of the Bank books as cashier. I find an entry relating to the taking of the assignment by Henry Helmick to the Bank against O. W. Porter in the Collection Register. It is the one about which Mr.

Devers testified this morning. I do not find any record in the Bank at all of any kind or nature showing that any money was paid to Mr. Helmick for the assignment of the Porter judgment. If there had been any, I think I would have found it. I made diligent search. I find no record in the Bank in relation to an assignment of any judgment that the Bank held against William Miller to Will R. King. I find no record there of any money being paid by Mr. King to the Bank for that assignment; I have searched diligently. Under the custom of banking, it would have been necessary for any money that had been paid to the Bank or by the Bank in these matters to have appeared of record. If any thing was paid in or out and not put on record, the effect upon the balance of the Bank would be that it could not be found at; in that way a mistake could have been discovered, and no such state appears on the record to my knowledge. We have a minute book of the First National Bank of Payette here. (Witness produces book.)

Q. (Defendant's Exhibit "M" for identification shown the witness.) You may state whether or not the Board of Directors held a meeting in relation to the paper which I have shown
75 you?

Objected to as irrelevant and immaterial, and also as incompetent. Objection sustained. Exception allowed.

Q. I wish you would state what, if any, action the Board of Directors of the First National Bank of Payette, Idaho, *to* took relative to the Exhibit which I have shown you?

Objected to as irrelevant, immaterial and incompetent. Objection sustained. Exception allowed.

Counsel here offer in evidence the latter part of Exhibit "M" for identification, which part offered is marked Exhibit "M1" for identification.

Objected to as incompetent, immaterial and irrel-vant, occurring after the commencement of the action.

Objection sustained. Exception allowed.

Exhibit "M1" is in the following words:

"Whereas, Henry Helmick did on the 29th day of April, 1903, assign to this Bank a judgment for $2775 and costs and disbursements amounting to $120.00, recovered by him in the Circuit Court for Malheur County, Oregon, on the 11th day of April, 1903, against O. W. Porter, which said judgment was assigned to this Bank for the purpose of collection only, and in which judgment or the proceeds thereof, this Bank never has had and does not now have any interest or claim, except as agent of said Henry Helmick for the purpose of collecting the same and,

Whereas, this Bank on or about the 27th day of July, 1903 commenced an action in the Circuit Court of the State of Oregon for Malheur County, against one William Miller, Esq., for the proceeds of said judgment, which had prior thereto been collected by said William Miller; and,

Whereas, in said action a judgment was recovered by this Bank against said William Miller about the 15th day of March, 1906,

for the sum of $3173.42, which said judgment was by the Supreme Court of the State of Oregon on the appeal taken in said action by the said William Miller, reversed and set aside, and a new trial ordered in said cause by said Supreme Court, and on which said appeal the Supreme Court held that and decided that the said Henry Helmick had the power and right to cancel and revoke the authority of this Bank, granted it under the said assignment; and,

Whereas, it appears that the said Henry Helmick on or about the 25th day of Sept., 1903, executed and filed for record with the county clerk of Malheur County, Oregon, an instrument in writing duly signed an- acknowledged by him, wherein the said Henry Helmick revoked, counterman-ed, and annulled the power of attorney theretofore granted this Bank and all authority conferred upon this Bank by the said assignment of April 27th, 1903; and it appearing also that the said Henry Helmick has fully ratified and confirmed the action of the said William Miller in disbursing the proceeds of the said Porter judgment and in not accounting
76 to this Bank therefor;

Now, therefore, be it resolved, That all litigation growing out of said assignment hereinbefore mentioned of Henry Helmick to this Bank, and particularly the action now pending in the Circuit Court of Malheur County, State of Oregon, wherein this Bank is plaintiff and the said William Miller is defendant, be immediately discontinued and dismissed, and the President and Cashier of this Bank are hereby authorized, empowered and directed in the name and for and on behalf of this Bank to execute and deliver to said William Miller, a release in full and of all demands whatsoever growing out of the said assignment; and it appearing that Will R. King, esq., the attorney who has heretofore appeared in and prosecuted said action, can no longer personally appear in the case,

It is, therefore, further resolved, That A. N. Soliss, of Ontario, Oregon, be and he is hereby authorize-, empowered and directed to appear in said action as attorney for this Bank, and to take proper steps and pro*f*eedings to secure an immediate dismissal of said action and a discontinuance of any and all litigation growing out of the said assignment of Henry Helmick to this Bank; and the cashier of this Bank is hereby authorized to pay and return to Will R. King, Esq., w*ah*tever consideration was paid by said Will R. King for the transfer to him of the judgment recovered by this Bank against the said William Miller, said judgment having been reversed and set aside by the Supreme Court of the State of Oregon on or about the 11th day of December, 1906, whenever the said Will R. King shall deliver to this Bank proper release and satisfaction of any claim which he may have against the Bank by reason *fo* the transfer to him of said judgment.

(Duly certified.)"

Cross-examination by Col. Wood:

I have been Cashier since Last August. When I said the books of the Bank would not show anything received or paid on account

of the assignment to the Bank by Helmick or of the assignment of the Bank to King, I referred to cash paid to the Bank or paid by the Bank. I didn't *mean* to say that the minutes of the Bank don't show that any such transaction as these assignments took place. There is a record in the minutes that shows that it did take place. There is something in the minutes that shows a revocation—not of the assignment of the Porter judgment to the Bank; I mean a revocation of the assignment of the Bank to King. There are no records on the books of the Bank on the cash account of the Bank, that it *paid* out money on account of these assignments and the litigation ensuing thereon. I have not found any moneys paid out by the Bank in connection with these assignments and the litigation that was had about it. The Bank books did no- show any disbursements by the Bank at all, only as between Lauer.

77 Wherever the books refer to moneys th-t had been received or moneys paid out, it has always been connected as far as I remember, with Lauer or Helmick. These payments from Lauer and Helmick were reimbursements to the Bank, as I understand it. I have got the books here, and I have got the letters here. I have one collection register here, but I think these collections would come in the second book, which is not here. The record that I find is this, and I get it from the dates of the letters; whe-ever the letters say th-t they are written to Mr. King or Mr. Smith, th-t money was remitted, *the* these charges were made on the Bank books as of the same date as being paid by Lauer. I presume the money was received from Lauer and Helmick on those accounts. The entries would be in the disbursements by the Bank. They were in the Cashier's check account and in the certificate of deposit account. I do not think that these books show for what account those moneys were received from Lauer and Helmick, why they were received.

Q. Does not show it was anything more than just a deposit of money?

A. Well, usually indicated "In re Helmick" or whatever or different suits that have been in progress. These moneys were paid into the Bank on specific accounts "In re Bank v. Miller," or whatever it was. They were disburse- by sending a cashier's check or a certificate of deposit to either Mr. King or Mr. Smith, as the case might be. As I have always understood it, when a bill came into the Bank in connection with the suit, Mr. Lauer would be called in and he would put up the money and the Bank, of course, would send the money, the Bank disbursed it.

Witness excused.

HENRY HELMICK, being called and duly sworn as a witness on behalf of defendat*n*, testified as follows:

My Name is Henry Helmick and I live at Vale, Oregon. I remember the occasion of making assignment of what is called

78 the Porter judgment to the First National Bank of Payette, Idaho. Mr. Lauer and Mr. Devers and Mrs. Helmick, I think were present and myself.

Q. How did you come to make that assignment, Mr. Helmick?

Objected to as irrelevant and immaterial. Objection sustained. Exception allowed.

Q. What, if any, indebtedness did the Bank then hold against you?

Objected to as irrelevant and immaterial. Objection sustained. Exception allowed.

Q. What if any, consideration was paid you by the Bank at the time of that assignment, for such assignment?

Objected to as irrelevant and immaterial. Objection sustained. Exception allowed.

Q. What reason was given you by Mr. Devers, if any, why he wanted that assignment to the Bank?

Objected to as irrelevant and immaterial. Objection sustained. Exception allowed.

Q. Was the dollar mentioned in that assignment, or any part of it, paid you at the time of the assignment?

Objected to as irrelevant and immaterial. Objection sustained. Exception allowed.

Q. (Plaintiff's Exhibit "—" here shown the witness). State if you ever saw that before Mr. Helmick?

A. Yes, sir.

Q. You signed this did you, Mr. Helmick?

A. Yes, sir, I did.

Q. I notice in this paper, Mr. Helmick, that you made this statement: "Whereas I have heretofore assigned said judgment to the First National Bank of Payette, Idaho, for a valuable consideration." State what consideration that was?

Objected to as irrelevant and immaterial. Objection overruled. Exception allowed.

Q. You may state what the valuable consideration was?

79 A. There was no money paid.

Q. Well, was there anything else paid?

A. It was understood th-t Jimmie Lauer was to get his money out of it.

Q. Now, you may state what the understanding was?

A. Well, Mr. Lauer, was to get what I owed him out of it.

Q. Now, was that the understanding between you and Mr. Devers at the time that assignment was made?

A. It was understood between I and Mr. Devers and Mr. Lauer.

Q. You testified before in the case of the Moss Mercantile Company against this Bank, did you not?

A. Yse sir.

(Judge Richards here takes a transcript of the trial of the case of the Moss Mercantile Company, Limited, a private corporation vs. the First National Bank of Payette, Idaho, and the same is here conceded by counsel to be a transcript of the trial of that case.)

Q. You were asked this question I believe, Mr. Helmick; "-hat interest did the First National Bank claim in that judgment" and you answered: "Nothing whatever." Did you so testify?

A. Yes, sir.

Q. Was th-t true?

A. Yes, sir.

Q. It is true now, isn't it?

A. Yes, sir. They had no more interest only for to—they were to collect it for me and Mr. Lauer.

Q. And I asked you this question: "Was there any money paid you that day on account of the assignment?" and you said "Not a dollar."

A. No sir, there was no money.

Q. That was correct, was it?

A. Yes sir.

Q. And this question was asked you by Mr. King on cross-examination: "What was the object of turning this over to
80 the Bank for collection?" And you answered: "They promised they would collect the money for us." Was that correct?

A. Yes sir.

Q. And this question was asked you: "Why did you want the Bank to collect it for you?" And you answered: "Because it seemed as though we couldn't collect it ourselves." Is that correct?

A. Yes, sir.

Counsel for plaintiff object to this examination, for the reason that he has called this man to the witness stand and made him his own witness, and I understand the rule to be that if he has been taken by surprise by him in any way *and* he can show he has made other statements at other times; but nothing of this kind is being shown, and he is merely reading questions which have been excluded before. We therefore object to this style of examination.

Objection sustained. Exception allowed.

Q. I want to ask you this question, Mr. Helmick, did you not state in your former testimony relative to this same matter, "that you didn't owe Mr. Lauer one cent?"

Objected to on the ground that it is incompetent. Objection sustained. Exception allowed.

Q. Did you not state there was no such conversation and no such statement made by you, that Mr. Lauer was to have one particle of interest in that judgment?

Objected to as irrelevant, immaterial and incompetent. Objection sustained. Exception allowed.

Q. Is it or is it not a fact that Mr. Lauer tried to get you to sign a statement to the effect that some of that money was due him afterwards?

Objected to as irrelevant and immaterial. Objection sustained. Exception allowed.

Q. Did you or did you not refuse to sign any such statement when presented to you by Mr. Lauer?

81 Objected to as irrelevant and immaterial. Objection sustained. Exception allowed.

Counsel for defendant here states to the court that the reason he is asking these questions is, he has introduced here a writing in which he says there was a valuable consideration, and counsel desires to show to the court that this witness stated directly opposite of that -wice on the former trials of these cases.

Q. What if any, consideration was paid by the Bank to you for that assignment?

Objected to as irrelevant and immaterial. Objection sustained. Exception allowed.

Q. What, if anything, did you owe to the Bank at that time?

Objected to as irrelevant and immaterial. Objection sustained. Exception allowed.

A. I understood I made the assignment to them for collection. When I made the assignment that was all; they were to collect it for me; They wasn't to charge me anything for collecting it; They were to pay Mr. Lauer what I owed him out of it and take out the expenses of the suit. I never denied owing Mr. Lauer anything, because he had a judgment against me for five or six hundred dollars.

Q. Didn't you state that you didn't owe him anything under that judgment?

A. Well, I didn't think he had got the judgment right, but of course that was a question of law. I didn't think that I owed it, but he had a judgment against me, and I never denied the judgment.

Q. I am not asking you about the judgment, I am asking you whether you didn't say you did not owe him one cent in your former testimony?

A. Well, I don't remember whether I did or not.

Q. Just to refresh your memory, Mr. Helmick, I will show you the testimony, (here shows witness page 55 of the tran-
82 script), the question was: "You said they wanted you to sign an order in favor of Mr. Lauer—interrupted—. Just read that Mr. Helmick, and I will ask you if this statement, I have shown to you, did you make those statements contained on that page in your testimony on the former trial of this case?

The court here rules that it is incompetent, immaterial and irrelevant. Exception allowed.

Counsel for plaintiff makes the objection also that it does not go to the point of contradiction. Objection sustained. Exception allowed.

Q. Did you state in the former trial of this case that you didn't think that you owed Mr. Lauer anything?

Objected to as incompetent, irrelevant and immaterial.

Counsel for defendant here states that he desires to offer portions of this original testimony on the former trial of thi- case in evidence, showing that the witness stated directly the opposite to what he

stated on the witness stand today, relative to his owing Mr. Lauer anything or that Mr. Lauer was to have any interest in that judgment. Objection sustained and motion denied; to both of such rulings exceptions are allowed.

Q. Mr. Helmick, when you consented to this assignment to Mr. King, you knew that you had made a complete settlement with the Moss Mercantile Company and your wife, did you not?

Objected to as incompetent, irrelevant and immaterial. Objection sustained. Exception allowed.

Q. At the time you made this written consent that has been introduced by plaintiff, you knew at th-t time that you had received the full consideration of the Porter judgment from the Moss Mercantile Company, did you not?

Objected to as incompetent, irrelevant and immaterial. Objection sustained. Exception allowed.

Q. You also knew at that time that you had given the Moss Mercantile Company an order on Mr. Porter for the full
83 amount that was coming to you from Mr. Porter, did you not?

Objected to as incompetent, irrelevant and immaterial. Objection sustained. Exception allowed.

Q. At the time you consented to the assignment to Mr. King you also knew you had executed, acknowledged and filed for record a revocation of the assignment to the Bank, did you not?

Objected to as incompetent, irrelevant and immaterial. Objection sustained. Exception allowed.

Q. I show you Defendant's Proof Exhibit "N," and you may state what that is, if you know?

Counsel for the plaintiff object to the form of the question asking this witness to state what the instrument is. Objection sustained. Exception allowed.

A. I signed this instrument. I know when I made this consent to Mr. King that I had executed this Exhibit "N" before that.

Q. What was your purpose then in consenting to Mr. King to that assignment from the Bank, after you had signed that revocation?

Objected to as irrelevant and immaterial. Objection sustained. Exception allowed.

Q. You and your wife are divorced are you not?

Objected to as irrelevant, incompetent and immaterial. Objection sustained. Exception allowed.

Q. You have how many children by your wife?

Objected to as incompetent, irrelevant and immaterial. Objection sustained. Exception allowed.

Q. Did you or did you not make a full and complete settlement with your wife in relation — this Porter judgment?

Objected to as incompetent, irrelevant and immaterial. Objection sustained. Exception allowed.

Q. Did you ever have a conversation with Mr. Miller relative to paying the money collected by him on the Porter judgment? over to the Moss Mercantile Company?

84 Objected to as incompetent, irrelevant and immaterial. Objection sustained. Exception allowed.

Q. Did you ever in any manner authorize Mr. Miller to pay that money over to the Moss Mercantile Company?

A. No, sir, I did not.

Q. You say you did not?

Objected to as incompetent, irrelevant and immaterial. Objection sustained. Exception allowed.

A. Mr. Miller was my attorney in the suit in which I recovered judgment against Mr. Porter?

Q. Did you authorize him to collect the money on that judgment you recovered against Mr. Porter?

Objected to as immaterial and irrelevant. Objection sustained. Exception allowed.

WILLIAM MILLER, the defendant, being called and sworn in his own behalf, testified as follows:

Direct examination:

I am the defendant in this case. I was attorney for Mr. Helmick in the original suit of Helmick vs. Porter. A judgment was rec-vered in that case; the judgment that has been mentioned here.

Q. What, if any, authority had you from Mr. Helmick to pay that money out when you collected it?

Objected to as incompetent, irrelevant and immaterial. Objection sustained. Exception allowed.

Q. To whom did you pay that money?

Objected to as incompetent, irrelevant and immaterial. Objection sustained. Exception allowed.

A. I was not at that time attorney for the Bank or in its employ, the First National Bank of Payette, Idaho. I signed the record as they have introduced it here in order to clear the record and satisfy the judgment of record. I had not been in the employ of the Bank. They never paid me anything for services rendered, not one cent.

85 Cross-examination by Col. WOOD:

By clearing the record I mean in order that the record would show that the money had been paid on the judgment.

Q. To the person legally entitled to receive it, is that the idea?

A. Well, if you so wish to put it.

Q. That is, the legal assignee of the Judgment creditor, Helmick?

A. If you wish to put it that way yes, sir. I never turned that money over to them, nor to Mr. King their assignee.

Here defendant rests in chief.

P. A. DEVERS being called testified on behalf of plaintiff in rebuttal as follows:

I have acted as an accountant in a bank, have had charge of bank books as Book Keeper, assistant cashier and cashier for practically eighteen years up to the time I left the First National Bank. In relation to the method of a bank keeping a running account with a party, disbursements or remittances for a special fund or purpose, the custom is to open a special account under some name that may be easily understood by the parties in the bank and to charge up each item as disbursements are made, and credit it with any receipts that may be received on account. I didn't open an account in the bank after I got this assignment of Helmick on the basis of that assignment. The name of the account was "Henry Helmick" with a notation referring to the Porter judgment. The bank made disbursements to that account and received money at different times.

86 I only sent to Mr. Lauer statements showing the condition of that account. I have one memorandum statement of this in my pocket, the original that was sent to Mr. Lauer; I got it from Mr. Lauer this morning. (Witness hands paper to counsel.)

The same is received in evidence, Marked Exhibit "LL," Plaintiff's proof, and reads as follows:

"The First National Bank, Payette, Idaho Sept. 28, 1905. Advances in matter of Bank vs. Miller and Injunction case of Moss Merc. Co. vs. Bank in same matter.

April 19, 1905, Cost on appeal to Supreme Court.....	$38.
April 26, transcript of testimony	42.
June 12, To — for brief	63.50
Aug. 11 To King for expenses	59.25
	$202.75
Interest	4.45
	$207.20
Overdraft	21.56
Total	$228.76"

These amounts were advanced and paid by the Bank on that account. I heard Mrs. Helmick testify this afternoon and heard her statement of the conversation that took place in reference to my statement that I would undertake to collect the Porter judgment for nothing because I had a grudge against the Moss Mercantile Company, or words to that effect; it is not true; it is utterly false. The only reference to Moss or the Moss Mercantile Company came through Mr. Helmick, stating that he didn't want the Moss people,

Mr. Moss or the Moss Company to have any of the judgment, and I suggested that we were not interested in that pha-e of it, that if he owed—interrupted——

Objected to by defendant as incompetent and as improper testimony, because the same question was asked the witness Helmick on the witness stand, who was present at the same conversation, about this particular conversation, and the Court held th-t it was not competent; and it is incompetent under the ruling of this court.

Objection overruled. Exception allowed.

Witness continues:

87 I told Mr. Helmick that if he owed Mr. Moss anything he ought to pay his honest debts to him the same as he would to anybody else, that he should not turn over the proceeds of the judgment to Mr. Moss unless he would release the securities, mortgages and other securities that he held, so Mr. Helmick could then protect his unsecured creditors. There was a conversation between us as to why I should undertake to make this collection without charging him.

Q. What was that?

Objected to on the ground that it is not the best evidence the same being in writing and stating the reason why he took it.

Objection overruled. Exception allowed.

A. The reason I took it without charge was made clear to me that Mr. and Mrs. Helmick were in rather poor circumstances and it occurred to me that no expense would come or would come to the Bank. It was a question of simply transferring an instrument, of merely receiving the money in the usual way and no expenses would be incurred, and at the same time we would protect a customer of the Bank.

Cross-examination by Judge RICHARDS:

The reason I sent Mr. Lauer that statement of account, Plaintiff's Exhibit "H," was that he might pay the amount involved, he paid it all back to the Bank. The Bank was not out a cent for that at the time I left. So far as I know it has been fully reimbursed.

Witness excused.

JAMES LAUER being called and duly sworn as a witness in behalf of plaintiff, testified in rebuttal as follows:

Direct examination:

I was present at the First National Bank of Payette, at the time Mr. Helmick delivered the assignment to the Bank of the Porter judgment.

Q. Did you hear Mrs. Helmick testify this afternoon and stating they would take it for nothing because they had a grudge
88 against the Moss Mercantile Company, or words to that effect?

Objected to as incompetent, because the court held that testimony was incompetent when Mr. Helmick was asked the same question while on the witness stand.

Objection overruled. Exception allowed.

Witness continues:

I heard Mrs. Helmick. I was present. No such conversation on the part of Mr. Devers or any one speaking for the Bank, occurred.

Plaintiff rests.

Counsel for the respective parties hereto at this time agree that the exhibits offered in this case, which are bound in a former record, may be left there and not go to the jury; and the stenographer may copy the same into this record as and for the original exhibits as offered.

After argument of the case to the jury *ny* respective counsel the Court charged the jury as follows:

"Gentlemen of the Jury:

This is a cicil action which was brought by the First National Bank of Payette, Idaho, a corporation, as plaintiff, against William Miller, defendant; and the pla-ntiff's complaint was filed in this Court on the 27th day of July, 1903. This case has been to the Supreme Court, and there by order of that court, one Will R. King has been substituted as plaintiff instead of the First National Bank of Payette, and this case is now prosecuted in this court, by order of the Supreme Court also in the name of Will R. King, substituted as plaintiff for the First National Bank of Payette, Idaho, against William Miller defendant. Having been substituted as plaintiff by order of the court Will R. King succeeds to any right that may be derived from this proceedings, and his rights are based upon the complaint as it was filed by the First National Bank of Payette in said action, and as may have been had between the First National Bank of Payette and Will R. King whereby any interest the Bank may have had in this action was transferred to Will R. King."

To the giving of which instruction and before the jury retired, counsel for defendant duly excepted, which exception was allowed.

The Court then read the complaint and answer to the jury.

Whereupon, the Court proceeded to instruct the jury as follows:

89 "To the new matter set up in this amended answer a reply was filed denying all the allegations thereof, except the plaintiff admits that the defendant received the amount of money alleged to in plaintiff's complaint and in the manner as in said complaint alleged; and then the reply sets up an immaterial matter, which tenders no issues here, and to which you need not pay any attention: that is to say, it tenders an issue, but an immaterial issue. And I will say the same as to the supplemental answer which was filed May 3d, 1907. This supplemental answer *which was filed May 3d, 1907. This supplemental answer* contains an allegation of the matter that the Court deems entirely immaterial, consequently it tenders an immaterial issue which has been stipulated as being admitted denied, but since it is entirely immaterial it will not be submitted to you."

To the giving of which instruction and before the jury retired, counsel for defendant duly excepted, which exception was allowed.

"I have read this complaint and answer at length rather than undertake to state the issues which are raised by the various pleadings in this case; and will say that this being a civil case it is incumbent on the party having the affirmative proposition to prove it by a preponderance of the evidence; and all these allegations contained in the complaint it is incumbent on the plaintiff to prove by a preponderance of the evidence; and all these affirmative allegations contained in the answer, which are material, it is incumbent upon the defendant to prove by a preponderance of the evidence; by a preponderance of the evidence is meant the better or more satisfactory evidence."

"I instruct you gentlemen, that if you should find from a preponderance of the evidence in this case, that the assignment of the Porter judgment was made, executed and delivered by Henry Helmick to the First National Bank of Payette, Idaho, and by it assigned to this plaintiff, then and in that event, it makes no difference whether there was anything paid as a consideration for such assignment or not, because a written *in* assignment of a chose in action is sufficient to transfer the legal title thereto without any money consideration having passed."

To the giving of which instruction and before the jury retired, counsel for defendant duly excepted, which exception was allowed.

"The assignment of the First National Bank of Payette, Idaho is sufficient without any money consideration being paid to convey to the plaintiff any legal title to the Porter judgment that it may have held at the time of such assignment; and if you should find that Henry Helmick at the time he made this assignment to the Bank was the owner of such legal title to said Porter judgment and the money due thereon, then in that event, such assignment is sufficient to empower this plaintiff to demand and collect any money due thereunder, and your verdict should be for the plaintiff in the sum of $2730.22 with interest thereon at the legal rate of six per cent. per annum since June 29th, 1903."

To the giving of which instruction and before the jury retired, counsel for defendant duly excepted, which exception was
90 allowed.

"The real question for you to determine in this case, gentlemen, is: to whom did the money belong which was paid to Miller by the Clerk of this Court on the Helmick-Porter judgment: If it was the property of the First National Bank of Payette, Idaho, and Mr. Miller paid it to the Moss Mercantile Company, then this plaintiff is entitled to recover in this action; and it would make no difference how honest Mr. Miller might have been or what might have been his belief at that time, as to whom it belonged."

To the giving of which instruction and before the jury retired, counsel for defendant duly excepted, which exception was allowed.

"In considering who was at that time the owner, of the money in question it is only necessary to determine who held the legal title to the Porter judgment at the time the money was paid on it and

turned over to Mr. Miller and when Mr. Miller turned the money over to the Moss Mercantile Company."

To the giving of which instruction before the jury retired counsel for defendant duly excepted, which exception was allowed.

"Unless you should find that the assignment was for the mere purpose of collection without coupling any interest in the judgment whatever, either to the Bank for or on behalf of its own interest, or in trust for another, the right to the money would follow the ownership of the judgment."

To the giving of which instruction and before the jury retired, counsel for defendant duly excepted, which exception was allowed.

"The complaint in this case was filed July 27th, 1903; and after the First National Bank of Payette, Idaho, as Helmick's assignee, had commenced the action Helmick could not without the Bank's consent revoke the Bank's assignment or prejudice its position, unless you find the evidence shows that the Bank held such assignment as the naked legal title to the Porter judgment for the sole purpose of collection and nothing more. But if the evidence should show that the assignment was for *the* that purpose alone with no pecuniary interest except or without compensation for collection, then and in that case such assignment constituted the Bank only an agent of Helmick, and could be revoked by him at any time before such collection was made."

To the giving of which instruction and before the jury retired, counsel for defendant duly excepted, which exception was allowed.

"But if the Bank took the assignment for the purpose of collection coupled with an interest or upon a trust to pay a portion of the money received thereunder to Lauer, and so informed Lauer, and then began this action against the defendant and became liable for attorney fees and costs of litigation, then Helmick could not without the Bank's consent give to another any legal right which would prejudice the right of the Bank to proceed to collect said
91 Porter judgment, and to protect itself from loss or liability."

To the giving of which instruction and before the jury retired, counsel for defendant duly excepted, which exception was allowed.

"I further instruct you that if the Bank and Helmick and Lauer all agreed to *in* the assignment to Wil R. King, and if King at the time assumed to distribute the funds received on the assignment, including compensation and reimbursement to himself, and if this was understood between the parties interested in said judgment and assignment as beneficiaries, then the Bank could not thereafter by any act of its own revoke the assignment to King, or in any way prejudice his right to proceed in the collection it had already commenced to collect and distribute said fund as agreed."

To the giving of which instruction and before the jury retired, counsel for defendant duly excepted, which exception was allowed.

"I instruct you at the request of the plaintiff, that if you find that Helmick was the owner of the judgment in Helmick vs. Porter at the time he assigned it to the First National Bank of Payette, and that the Bank was the owner of the judgment at the time it assigned

it to Will R. King, and that he has ever since been and continued to be the holder and owner of said judgment, then you must find a verdict for the plaintiff."

To the giving of which instruction and before the jury retired, counsel for defendant duly excepted, which exception was allowed.

"I instruct you that the assignment by Helmick to the Bank and by the Bank to King are valid assignments and conveyed to the Bank and to King respectively the legal title to the Helmick-Porter judgment. No consideration was necessary between the Bank and Helmick or between King and the Bank to support the respective assignments."

To the giving of which instruction and before the jury retired, counsel for defendant duly excepted, which exception was allowed.

"And I further instruct you at the request of the defendant: That if you find from the evidence introduced before you in this case that Henry Helmick assigned the judgment he held against O. W. Porter to the First National Bank of Payette, Idaho, plaintiff in this case, and that such assignment was made for the purpose of hindering, delaying, cheating or defrauding any creditor or creditors of the said Henry Helmick, then your verdict will be for the defendant."

"That if you find from the evidence herein that Henry Helmick assigned a judgment he held against O. W. Porter to the First National Bank of Payette, Idaho, and by the terms of such assignment the First National Bank was expressly appointed as
92 the irrevocable attorney of the said Henry Helmick, with power of substitution, the stipulation to that effect would not prevent Henry Helmick from rescinding such authority, if you find from the evidence he did rescind it, unless such Bank had an interest in the proceeds of such judgment, independent of compensation of the same."

"That if you should find that the First National Bank had a pecuniary interest in said judgment by reason of its obligation, if any, to third persons, that a revocation of the assignment by Henry Helmick to the First National Bank could not operate to divest the Bank of such interest, "and for such purpose," and for the purposes of this action such revocation will not affect the right of the plaintiff."

To the giving of which instruction and before the jury retired, counsel for defendant duly excepted, which exception was allowed.

"The court further instructs you that you are the exclusive judges of all questions of fact in this case which you must decide, and of all evidence thereon addressed to you."

"You are also the exclusive judges of the credibility of all witnesses."

"Your power of judgment of the effect of evidence is not arbitrary, but it is to be exercised with legal discretion, "and in subordination to the rules of evidence."

"All questions of fact in this case may be proved by direct evidence, indirect evidence or by circumstantial evidence."

"Direct evidence is that which proves the fact in dispute directly

without any inference or presumption, and which in itself, if true, conclusively establishes that fact. For example, evidence of a person of a fact to which he was an eye-witness."

"Indirect evidence is that which tends to establish a fact in dispute by proving another, and which, though true, does not of itself conclusively establish the fact, but which affords an inference or presumption of its existence. For example, proof of an admission by a party to a fact in dispute; that is, proof of a fact from which the fact in dispute may be inferred."

"Circumstantial evidence, in a civil case, is proof of such facts and circumstances connected with or surrounding the facts to be established as tends to prove its existence."

"The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in this case."

"A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, by the character of his testimony of by evidence affecting his character or motive, or by contrary evidence."

"You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds as against a less number that *does* or against a presumption *or* law or other evidence satisfying your minds."

93 "A witness false in any part of his testimony is to be distrusted in others. And if you should find any witness has testified willfully false in any material part of his testimony, you should disregard the entire testimony of such witness, except *is* so far as it may be *coorob*orated by some other credible evidence which you do believe."

"This being a civil case the affirmative issues must be proved; and if you should find the evidence is contradictory your verdict should be in accordance with the preponderance of the evidence. And by a preponderance is meant the better or more satisfactory evidence."

"Evidence is to be estimated not only by its own intrinsic weight, but also accord- to the evidence which it is in the power of one side to produce and of the other side to contradict, therefore, if weaker or les- satisfactory evidence is offered when it appears that stronger or more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust."

"After you retire you will select one of your nu-ber *of* Foreman, who will sign either form or verdict you may agree upon; and two forms of verdict will be submitted to you, one finding for the plaintiff in the sum prayed for in the complaint—that is to say, $2,730.22 with interest thereon at the rate of six per cent per annum from June 28th, 1903, which may be added to the principal and your verdict state one aggregate amount at this time; the other finding for the defendant."

"Whereupon counsel for the defendant requested the Court to give the following instructions:

"The jury are instructed that *thwen* a judgment is assigned for the purpose of collection only, no consideration being paid therefor by the assignee, and the collection is to be made without compensa-

tion, the assignee is a mere gratuitous agent for the purpose of collection and his authority to act may be revoked at any time by the principal of judgment creditor and in this case, if you find or believe from the evidence that The First Natinal Bank of Payette, Idaho, took the assignment from Henry Helmick of what has been referred to as the Porter judgment, without paying any consideration therefor, then I instruct you that Henry Helmick could revoke the authority of such Bank at any time be*o*fre the money had been actually collected by such Bank under such assignment, and the revocation which has been introduced in evidence and which purports to have been executed on or about Sept. 25th, 1903, if you find that the same is genuine, would be sufficient to revoke the authority of said Bank, granted to such Bank under the alleged assignment of the Porter judgment, if you find that such assignment was executed and given to such Bank w*oht*out any consideration being paid therefor and for the purpose of collection only."

Which instruction the Court refu*s*ed to give and to which refusal of the Court so to instruct, defendant duly excepted, and which exception was allowed.

Whereupon counsel for the defendant requested the Court to give the following instructions:

94 "The jury are further instructed that if you find or believe from the evidence that the First National Bank of Payette, Idaho, took the alleged assignment of the Porter judgment without paying any consideration therefor and for the purpose of collection only, and that the said Henry Helmick has revoked such assignment or the authority given to the Bank thereunder then I instruct you that the First National Bank of Payette, Idaho, or its assignee, Will R. King, cannot prosecute an action based on such an assignment, and your verdict must be for t*eh* defendant."

Which instruction the court refused to give, and to which refusal of the Court so to instruct, defendant duly excepted, and which exception was allowed.

Whereupon counsel for defendant requested the Court to give the jury the following instructions:

"You are further instructed that a written order given for a valuable consideration directing a debtor to pay to the payee named in the order, the whole of his indebtedness to the drawer thereof, operates as an assignment and will take precedence over any subsequent assignment of such indebtedness, or an assignment of a judgment based thereon, and in this case, if you believe that the order which reads as follows:

'PAYETTE, IDAHO, *Oct.* 30, 1900.

Mr. O. W. Porter:

You are hereby authorized and directed to pay over to the Moss Mercantile Company, Limited, all moneys which you are now owing me."

(Signed) HENRY HELMICK.'

is genuine and was given for a valuable consideration, then you are instructed that such order operated as an assignment of the money

due Henry Helmick from O. W. Porter and of any judgment that might be recovered thereon, and any subsequent assignkent made by Henry Helmick to the First National Bank of Payette, Idaho, of the judgment based on such indebtedness would be void and of no effect, as against the Moss Mercantile Company, Limited."

Which instruction the court refuesd to give, and to which refusal of the Court so to give, defendant duly excepted, and which exception was allowed.

Whereupon the counsel for the defendant requested the court to give the jury the following instruction:

"The credit of a witness may be impeached by showing that he has made statements contrary to and inconsistent with what he has testified on the trial concerning matters, material and relevant to the issues, and when such witness has been thus impeached about matters material and relevant to the issue, you have the right to reject all the testimony of such witness except so far as the testimony of such witness has been corroborated by other credible evidence."

Which instruction the Court refused to give, and to which refusla of the court so to instruct, the defendant duly excepted and which exception was allowed.

95 Whereupon counsel for defendant requested the court to give the jury the following instructioon:

"You are the judges of the credibility of the different wintesses and the weight to be attached to the testimony of each of them, and you are not bound to take the testimony of any witness as absolutely true, and you should not do so if you are not satisfied from all the facts and circumstances proven on the trial that such witness is mistaken in the matters testified to by him or her, or that he or she konwingly and intentionally testified falsely to any matter material to the issues, or that for any other reason his or her testimony is untrue and unreliable. You are at liberty to disregard the entire testimony of any such witness, except in so far as his or her testimony may be corroborated by the testimony of other credible witnesses or supported by other credible evidence in the case."

Which instruction the court refused to give, and to which refusal of the court so to instruct, defendant duly excepted, which exception was allowed.

Whereupon counsel for defendant requested the court to give the jury the following instruction:

"You are instructed that if you find from the evidence that Henry Helmick assigned a judgment he held against one O. W. Porter, to the First National Bank of Payette, Idaho, and that in making such assignment the said Henry Helmick was induced so to do by the First National Bank of Payette for the purpose of hindering, delaying, cheating or defrauding a creditor of the said Henry Helmick, then you- verdict will be for the defendant."

Which instruction the court refused to give, and to which refusal so to instruct, defendant duly excepted, which exception was allowed.

Whereupon counsel for defendant requested the court to give the jury the following instruction:

"You are instructed that if you find from the evidence herein,

that Henry Helmick assigned the judgment he held against O. W. Porter to the First National Bank of Payette, Idaho, without any consideration therefor, under an agreement that the money should be collected by such Bank without compensation, and when so collected such money would be subject to the order of Henry Helmick, your verdict will be for the defendant."

Which instruction the Court refused to give, and to which refusal of the Court so to instruct, defendant duly excepted, which exception was allowed.

Whereupon counsel for defendant requested the court to give the jury the following instruction:

96 "Will R. King, the plaintif- her-in, claims the right to prosecute this action against the defendant, William Miller, under an assignment to him by the First National Bank of Payette, Idaho, of a judgment such Bank held against the defendant, William Miller, and the Court instructs you that Will R. King, could acquire by such assignment no better right than such Bank had at the time of making such assignment that is on the 29th day of March, 1906, the date of such assignment."

Which instruction the court refused to give, and to which refusal of the Court so to give, the defendant duly excepted, which exception was allowed.

Whereupon counsel for defendant requested the Court to give the jury the following instruction:

"It is claimed by the plaintiff herein that one Henry Helmick assigned a certain judgment he held against one O. W. Porter to the First National Bank of Payette, Idaho, and that the defendant, William Miller, thereafter collected the money on such judgment and failed to pay the same over, or any part of it, to the Bank, and that the Bank thereupon brought this action against William Miller to recover the money so collected, and the defendant claims that shortly after this action was commenced the said Henry Helmick revoked the right claimed by the Bank under such assignment to prosecute this action, and the plaintiff contends that thereafter the Bank recovered a judgment against William Miller for the money so collected, by him, and thereupon the Bank assigned such judgment to plaintiff Will R. King. The Court instructs you that this judgment against William Miller was set aside by the Supreme Court and this cause reman-ed here for trial; and the Court further instructs you that if you find from the evidence that the Bank had no interest in such judgment at the time of assigning it to the plaintiff, Will R. King, that your verdict should be for the defendant."

Which instruction the Court refused to give, and to which refusal of the Court so to instruct, defendant duly excepted, which exception was allowed.

Whereupon counsel for defendant requested the Court to give the jury the following instruction:

"The jury are instructed that if you find from the evidence that Henry Helmick revoked the assignment of the Porter judgment which he gave to the First National Bank of Payette, Idaho, and that

he, the said Henry Helmick, also executed the agreement of final settlement between himself and the Moss Mercantile Company, which has been introduced in evidence in this case and which bears date September 28th, 1903, then I instruct you that neither the said Henry Helmick nor the said Bank could, after such agreement of Sept. 28th, 1903, has been executed, make any assignment of such judgment or of any claim against William Miller based thereon, and your verdict should then be for the defendant."

Which instruction the Court refused to give, and to which refusal of the Court so to instruct, defendant duly excepted, which
97 exception was allowed.

Whereupon counsel for defendant requested court to give the jury the following instruction:

"The jury are instructed that if you find from the evidence that Henry Helmick revoked the assignment of the Porter judgment which he gave to the First National Bank of Payette, Idaho, and that he, the said Henry Helmick, also executed the agreement in writing addressed to Mrs. Helmick bearing date September —, 1903, which has been introduced in evidence in this case, then I instruct you that neither the said Henry Helmick nor the First National Bank of Payette, could, after such agreement or instruction in writing addressed to Mrs. Henry Helmick had been executed, transfer or make any assignment of such judgment or of any *cal*im against William Miller based thereon, and Will R. King would take no interest under his alleged assignment, and your verd*ict* should then be for the defendant."

Which instruction the Court refused to give, and to which refusal of the Court so to instruct, defendant duly excepted; which exception was allowed.

Whereupon counsel for defendant requested the Court to give the following instruction to the jury:

"The jury are instructed that under the evidence herein, your verdict should be for the defendant."

Which instruction the Court refused to give, and to which refusal of the Court to so instruct, defendant duly excepted, which exception was allowed.

Whereupon the Court stated to the jury as follows:

"You will be permitted to take with you the pleadings that I have read and submitted, and all of the exhibits, except those waived by counsel as being attached to part of the Supreme Court record, with you during your d-liberations."

98 STATE OF OREGON,
County of Grant, ss:

I, the undersigned, Circuit Judge of the Ninth Judicial District of the State of Oregon, before whom the entitled cause was tried, do hereby certify that the bill of exceptions herein and hereto attached have been this day settled and allowed, and that the same contains all of the objections interposed to the introduction of the testimony and proof and the rulings of the court thereon and the exceptions thereto taken, with all of the material evidence and sufficient

thereof offered and introduced to explain the exceptions, and all the rulings of the court made upon all questions, morions and objections coming before the court upon the trial thereof with the exceptions thereto and sufficient of the testimony, evidence and proof to explain the same: And Exhibit "A" attached to and made a part of said Bill of Exception is a part thereof and contains all the testimony introduced and evidence offered and submitted upon the trial of said cause; and the said bill of exceptions together with the said Exhibit "A" also contains all the instructions given by the court to the jury upon the trial of said cause, and all the exceptions taken by counsel thereto and allowed by the court; the instructions asked for by the defendant and refused by the court and the exceptions taken by counsel to such refusal with the allowance of such exceptions by the court, together with sufficient of the evidence to explain such exceptions. And the said Bill of Exceptions, including said Exhibit "A" as a part thereof, is now here allowed, approved and settled and signed by me.

Done and dated at Chambers this 30th day of August, 1907.

GEO. E. DAVIS,
Judge of the Ninth Judicial District of the State of Oregon.

99 In the Supreme Court of the State of Oregon.

WILL R. KING, Respondent, Substituted as Respondent in the Supreme Court for the First National Bank of Payette, Idaho, Appellant,

v.

WILLIAM MILLER, Defendant.

Appeal from the Circuit Court for Malheur County.

The Honorable George E. Davis, Judge.

C. E. S. Wood, for Respondent.
Oliver O. Haga, for Defendant.

BEAN, *C. J.*

Affirmed.

Filed Oct. 6, 1908.

J. C. MORELAND, *Clerk.*

100 On April 11, 1903, Henry Helmick recovered judgment in the circuit court for Malheur county, against O. W. Porter, for $2,930.22, and costs. Defendant Miller was his attorney. On the 27th of the month Helmick, being indebted to one J. A. Lauer, assigned the judgment to the First National Bank of Payette, Idaho, for collection, the bank to pay the amount due Lauer from the

money so collected, and to hold the balance subject to the order of Helmick. At the time of the assignment the bank gave *the* Helmick a writing, stating that it had received the judgment for collection, "the proceeds of which, when collected, shall be subject to your order." Immediately after the assignment the bank notified Miller thereof, and instructed him to collect the amount due on the judgment, deduct his fees, and remit the balance to it, which he agreed to do. On June 29th Miller made the collection, acknowledging satisfaction of the judgment on the record by signing the name of Helmick and of the bank, by himself as attorney, deducted $200 for his fee, but, in place of remitting the balance to the bank, paid it over to the Moss Mercantile Company, who claimed to have an assignment of the debt, upon which the judgment was based, prior in time to the bank. On July 13th Helmick and Lauer agreed in writing with the bank to indemnify it against the costs and expenses of the litigation, and on the 27th of the month the bank commenced an action against the defendant to recover the money collected by him, alleging in its complaint that the defendant was its agent and attorney, duly authorized by it to collect and receive the money, and as such agent collected and received on the judgment the sum of $2,930.22, of which amount he was duly authorized by plaintiff to retain $200 for his fees, and that he had failed and neglected to pay the balance over to it. On September 25th Helmick undertook to revoke in writing the assignment of the judgment to the bank, and to ratify and approve the action of defendant in paying the money collected thereon to the Moss Mercantile Company. Shortly thereafter the mercantile company commenced a suit in equity against the bank, to enjoin it from prosecuting its action at law against the defendant, but this suit was dismissed. Moss Mercantile Co. v. First National Bank, 47 Or. 361, 82 Pac. 8, 2 L. R. A. (N. S.) 657. Defendant thereupon answered in the law action, denying that he collected the judgment, as agent of the bank, admitting the assignment of such judgment to the bank, but denying that it was for valuable consideration, and affirmatively alleging (1) that he was the agent of Helmick in the collection of the money, and collected the same at his request; (2) that prior to the assignment of the judgment to the Bank, Helmick had assigned and transferred to the Moss Mercantile Company the debt upon which the judgment was based, of which *the* fact the bank had notice, and that Helmick instructed him to collect the money on such judgment and pay it to the mercantile company; (3) that the assignment to the bank was for collection only and without consideration; (4) that it was made for the purpose of defrauding the mercantile company and that such company was the owner, and entitled to the proceeds of the judgment, and defendant had paid the money to it, which act was ratified and approved by Helmick; (5) the revocation by Helmick of the assignment of the judgment to the bank. A reply put in issue the averments of the answer, and a trial was had on March 13, 1906, which resulted in a verdict and judgment in favor of plaintiff for the amount prayed for in the complaint. On March 29th the bank at the

request of Helmick and Lauer, assigned the judgment to W. R. King, one of its attorneys, with the understanding and agreement that from the amount collected thereon, he would pay Lauer $1,943, the bank $100 to cover costs and expenses incurred by it in the litigation, his own fees and the costs of collection, and the balance to one Graham, for the benefit of Helmick. Defendant thereafter appealed from the judgment, and when the cause came on for hearing in this court, King appeared, and moved to be substituted as party plaintiff in lieu of the bank, setting out in his petition therefor the assignment of the judgment to him. Defendant consented to this application, and an order was thereupon made substituting King as plaintiff, and from that time on the cause proceeded under his name. On December 11th the judgment was reversed, and a new trial ordered. A cost bill was subsequently filed by defendant under the substituted title, and a mandate under such title was issued and remitted to the court below. Before a retrial of the cause, however, the control of the bank had passed into the hands of the members of the Moss Mercantile Company, and on April 24, 1907, it executed a release to defendant of the cause of action, and by resolution directed its attorney to dismiss the action then pending. On April 25th, in pursuance of this resolution, the bank appeared in court by its counsel, and moved to dismiss the action, but such motion was overruled. Defendant thereupon filed a similar motion for the same reason, to which the bank assented, but this was likewise overruled. An order was afterwards made by the court below substituting Mr. King as plaintiff. Upon the trial judgment was rendered in his favor, from which defendant appeals.

Oliver O. Haga, for appellant. C. E. S. Wood, for respondent.

BEAN, *C. J.* (after stating the facts as above). The record contains numerous assignments of error, but they may, we think,
101 be grouped under the following heads: (1) The action of the court in overruling the motions of the bank and of defendant to dismiss the action, and in substituting Mr. King as plaintiff, allowing the action to proceed in his name, and admitting proof of the assignment of the judgment by the bank to him; (2) in admitting evidence that the assignment by Helmick to the bank of the judgment in question, and from the bank to King, was intended as security for the payment of a debt owing from Helmick to Lauer; (3) in refusing to permit the defendant to show that after the assignment to the bank, and after defendant had collected the money due thereon, and the bank had commenced an action against him to recover the same, Helmick and the mercantile company had a settlement and adjustment of their affairs, in which Helmick ratified and approved the payment of the money collected by defendant on the judgment to such company; (4) in refusing to allow defendant to show that at the time of the assignment of the judgment by Helmick to the bank, Helmick was indebted to the mercantile company, of which fact the bank had knowledge, and that the assignment was for the purpose of defrauding such company; (5) in refusing to admit an order of Helmick on Porter,

the judgment debtor, dated some two years prior to the recovery of such judgment, to pay to the mercantile company any moneys due him, and in refusing to admit in evidence the resolution of the board of directors of the bank, passed after the judgment had been assigned to Mr. King, releasing or attempting to release defendant from any further liability.

In support of the first position it is contended that when the judgment which the bank had recovered against defendant was reversed, and a new trial ordered, the case stood in the same condition as if no assignment of the judgment had been made to Mr. King, and that the bank had control over the action and right to dismiss it, regardless of such assignment. The claim is that under the law an assignee of a judgment, which is subsequently vacated or reversed, takes no interest whatever under the assignment, and that his remedy is exclusively against the assignor to recover the amount paid therefor. But we understand the law to be that an assignment of a judgment, unless otherwise intended, carries with it the claim upon which the judgment was based. It is so stated by Mr. Black (2 Black on Judg. § 948) and Mr. Freeman (2 Freeman on Judg. §431), and in Pattison v. Hull, 9 Cow. (N. Y.) 747, it was held that the assignment of a judgment for a debt carries the debt, and if the latter be secured by a mortgage it carries the mortgage also, Mr. Justice Cowan saying: "The assignment of a judgment necessarily carries the debt, nor is it possible to separate them. The judgment would be barren, nor can we conceive of its existence without the debt. I must therefore hold the debt to be directly assigned in this case, and all the effects must follow which the law attaches to an assignment of that character. One of these is that an interest in the mortgaged premises passes as an incident to the debt which is the principal." To the same effect: 23 Cyc. 1417; 17 A. & E. Ency. (2d Ed.) 882; Brown v. Scott, 25 Cal. 189; Heisen v. Smith, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39; Bolen v. Crosby, 49 N. Y. 183. It is true the assignee of a judgment stands in no better position than his assignor, and the judgment thereafter may be vacated, reversed, or set aside. In such case the assignee has a remedy against the assignor to recover the amount paid for the judgment, on the ground of a failure of consideration. 23 Cyc. 1424; Weber v. Tschetter, 1 S. D. 205, 46 N. W. 201. But we do not understand that he is compelled in all cases to pursue such remedy. If, notwithstanding, the vacation or reversal of the judgment, the original action is still pending and undetermined, he may, if he so elect, continue the same to final decision, and thus enforce the claim or demand upon which the judgment is based.

The case of Vila v. Weston, 33 Conn. 42, principally relied upon by defendant, was an action on a promissory note and a common count in general assumpsit. The judgment was by default. The plaintiff made an assignment to one Goodman, and the judgment was subsequently reversed, and the cause again entered on the trial docket. The plaintiff thereafter sought to continue the action to final judgment, and, in view of the rule apparently in force in that state that an action abates by the transfer of the cause of action pendente lite, it became important to ascertain what was intended

to pass by the assignment; if the debt, the action abated, and could not be continued by the plaintiff after reversal, but if the judgment only, he could do so. The court held that from the language of the assignment, in the light of the surrounding circumstances, it was not the intention of the parties to pass title to the cause of action, but to the judgment only, and that under the statutes, when the judgment was reversed, the parties were restored to their original status, and the assignor could continue the action in his own name to final determination, notwithstanding the assignment; the remedy of the assignee being to recover the money paid for the judgment. But the court expressly says that the question whether the assignee would have had a right in equity to the new judgment, if he had so elected was not decided. The same effect was apparently given to the vacation of a judgment by an appeal in Bennett v. Lathrop, 71 Conn. 613, 42 Atl. 634, 71 Am. St. Rep. 222. These cases are therefore authority only for the position that, where it is expressly intended by the parties to assign a judgment only, the assignee
102 takes nothing if the judgment is subsequently reversed or vacated, and this may be conceded. But where the assignment is of the judgment without any reservation whatever, it, in our opinion, necessarily carries the cause of action upon which it is based; and where, as under our statute (B. & C. Comp. § 38), an action does not abate by the transfer of any interest therein if the cause of action survive, the assignee is in the same position after reversal as any other purchaser pendente lite, and entitled to the same rights and remedies.

Next it is claimed that the assignee of a cause of action in a pending suit cannot be substituted in place of his assignor, and therefore Mr. King had no right to control the present litigation. We do not regard this question, however, of great importance in this case. The record discloses that the substitution of Mr. King for the bank was made by the consent of the defendant, and it would seem, therefore, that it is too late for him to make any objection thereto. But, however this may be, and whatever the rule may be in reference to the right of the assignee of a cause of action pendente lite to be substituted in place of the assignor, he certainly has a right to have the action continued in the name of his assignor for his benefit (20 Ency. Pl. & Pr. 1035; Dundee Mortgage & Trust Investment Company v. Hughes [C. C.] 89 Fed. 182; Elliot v. Teal, Fed Cas. No. 4,389); and the courts will protect him against the act of the assignor (Walker v. Felt, 54 Cal. 386) and of the debtor after he has notice of the assignment (Mason v. Beach, 55 Wis. 607, 13 N. W. 884). And, therefore, whether Mr. King was properly substituted as plaintiff is immaterial, because in any event he had a right to control the action, and the bank could not, after the assignment, dismiss it against his objection. Some contention is made that a supplementary complaint should have been filed setting up the assignment. But since the substitution was made by the consent of defendant, and without objection on his part, it is doubtful whether he can raise the question suggested, but we find the rule announced in states where the statute authorizes the substitution of an assignee that the matter is optional, and the action may, if the assignee de-

sires, be continued in the name of the original party and no supplemental complaint is necessary. Lowell v. Parkinson, 4 Utah, 64, 6 Pac. 58; Hawes on Parties, § 34; 20 Ency. Pl. & Pr. 1033.

It is next claimed the court below erred in admitting evidence that the assignment to the bank by Helmick of the judgment recovered by him against Porter and the assignment from the bank to Mr. King, was intended as security for the payment of a debt owing from Helmick to Lauer, because the terms of the contract between Helmick and the bank are in writing. The complaint does not aver that the assignment was made as security for the payment of Helmick's debts, and that a national bank cannot act as a trustee. The rule is settled in this jurisdiction that an assignee of a chose in action may maintain an action thereon in his own name, although he pays no consideration therefor. Gregoire v. Rourke, 28 Or. 275, 277, 42 Pac. 996. By the assignment he becomes the real party in interest because he has a valid transfer as against the assignor, and holds the legal title to the demand. This entitles him to sue thereon in his own name. Hawes on Parties, § 34; Sheridan v. Mayor, 68 N. Y. 30; Allen v. Brown, 44 N. Y. 228; Curtin v. Kowalsky, 145 Cal. 431, 78 Pac. 962. And in bringing such suit he is not compelled or required to disclose his representative capacity in his complaint. Langdon v. Thompson, 25 Minn. 509. And this is so, although he may be a mere agent or trustee with no beneficial interest (Cassidy v. Woodward, 77 Iowa, 354, 42 N. W. 319), or has agreed to hold the proceeds as trustee of the assignor or other parties (Anderson v. Reardon, 46 Minn. 185, 48 N. W. 777). It may be true that, where the plaintiff sues in a representative capacity as executor, assignee for benefit of the creditors, trustee of an express trust, and the like, he must disclose for whom he is trustee. School District No. 42, Garfield Co. v. Peninsular Trust Co., 13 Okl. 479, 75 Pac. 281. But this doctrine does not apply to an action brought by the assignee of a chose in action who is the owner and holder of the legal title. It is sufficient for the defendant if payment by him to the plaintiff will be a protection against a demand for the same debt by other parties, and therefore we think proof that the assignment was made as security for the payment of an indebtedness to Lauer was competent under the pleadings. It tended to show the consideration for the transfer and such an interest in the assignee that Helmick could not thereafter revoke the assignment. It is said that a national bank cannot act as a trustee, but we do not understand how this question becomes important here. There is no rule of law preventing a national bank from taking an absolute assignment of a claim for collection and agreeing to pay the proceeds or part thereof to another. By such a transfer the legal title passes to the bank, and one acting as its agent or representative and collecting the money thereon, cannot refuse to pay it to his principal on the ground that it had no legal right to own such claim. In this case after the judgment had been assigned to the bank it directed the defendant to collect the amount due thereon for it, and he agreed to do so. When he made the collection it was his duty to pay it over to the bank, unless in fact the money belonged to another. And he cannot escape liability

by setting up the defense that the bank had no right, in the first instance, to take the assignment.

Next it is claimed that parol proof that the assignment
103 to the bank was in part for the benefit of Mr. Lauer was varying or contradicting the terms of a writing. At the time the assignment was made the bank signed and delivered to Helmick a letter, stating that the judgment had been entered for collection, the "proceeds of which, when collected, shall be subject to your order," and it is insisted that the evidence referred to is contradictory of this writing. But the defendant was not a party to such contract. There is no attempt in this case to vary or contradict the writing as between the parties who made it. It was admissible, tending to show the terms of the agreement under which the assignment was made, but was not conclusive on the parties to this litigation. Lewis v. First National Bank, 46 Or. 182, 78 Pac. 990; Peterson v. Creason, 47 Or. 69, 81 Pac. 574. It is next claimed that some time after the assignment of the judgment by Helmick to the bank, and after the money had been collected on such judgment by defendant and paid to the Moss Mercantile Company, and the bank had brought an action to recover the same, Helmick revoked the assignment, and in a settlement between himself and the Moss Mercantile Company ratified and approved the payment of the money collected by defendant on the judgment to such company. But as the assignment of the judgment by Helmick to the bank was intended as security for the payment of a debt due from him to Lauer, a revocation of such assignment after the bank had begun an action against defendant to recover the money collected by him on the judgment, or an attempted ratification or approval of the payment of such money to the mercantile company, is no defense for defendant in the present case. Walker v. Felt, 54 Cal. 386; Frink v. Roe, 70 Cal. 296, 11 Pac. 820.

It is said the court erred in refusing to admit testimony tending to show that the assignment of the judgment by Helmick to the bank was made for the purpose of defrauding creditors, and especially the Moss Mercantile Company. But this is a matter with which defendant has no concern. His duty was to pay the money collected by him on the judgment to the rightful owner. The assignment was valid, and passes the legal title as between the parties, even if made with intent to defraud creditors. It was voidable only at the instance of the person or persons attempted to be defrauded, in a proper proceeding brought for the purpose. Pitkin v. Burnham, 62 Neb. 385, 87 N. W. 160, 55 L. R. A. 280, 89 Am. St. Rep. 763. As said by this court in Moss Mercantile Co. v. Bank, 47 Or. 361, 82 Pac. 8, 2 L. R. A. (N. S.) 657, the point in controversy is whether the money collected by Miller belonged to the bank or the mercantile company. If it was the property of the bank, Miller is liable to it, but if it belonged to the Moss Mercantile Company, and he paid it over on demand, such payment will be a complete defense, and so the only question is whether the money collected on the judgment by Miller in fact belonged to the bank, the assignee and owner of the judgment, or whether it belonged to and was owned by the Moss Mercantile Company. Unless it was owned by the latter, the motive

which prompted Helmick to make the assignment to the bank was of no consequence to the defendant, and he cannot justify the payment of the money to some creditor of Helmick on the ground that the assignment was made for the purpose of defrauding such creditor. He is not the representative of, nor does he stand in place of, the creditor. His duty, after he collected the money, was to pay it to the rightful owner, and not assume to determine who was in equity and good conscience entitled to it.

It is claimed that the Moss Mercantile Company was in fact the owner of the money, because some two years or more prior to the recovery of the judgment by Helmick against Porter, Helmick gave to such company an order on Porter authorizing and directing him "to pay over to Moss Mercantile Company, Limited, all moneys which you are now owing me." There is no proof that this order was ever accepted by Porter, or that the "moneys" therein referred to was the debt or obligation upon which the judgment subsequently recovered by Helmick against Porter was based. Under such circumstances the order could not have operated as an assignment of a judgment recovered some two years after its date. It is limited on its face to the moneys "now owing," and does not purport to assign or transfer or in any way affect subsequent indebtedness.

Judgment affirmed.

King, C., being respondent, took no part in this decision.

104 Be it remembered that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the City of Salem, on the first Monday, the 5th day of October, 1908, Present: Hon. Robert S. Bean, Chief Justice, Hon. Frank A. Moore, Associate Justice, Hon. Robert Eakin, Associate Justice, and J. C. Moreland, Clerk, the following proceedings were had on Tuesday the 6th day of October, 1908, the same being the Second judicial day of said term:

WILL R. KING, Respondent, Substituted as Respondent in the Supreme Court for the First National Bank of Payette, Idaho, Appellant,

vs.

WILLIAM MILLER, Appellant.

Appeal from Malheur County.

This cause having, on the 14th day of July, 1908, been argued and submitted to the court upon and concerning all the questions arising upon the transcript and record, and then reserved for further consideration. And the court having duly considered all the said questions, as well as the suggestions made by counsel in their argument and briefs, finds that there is not error as alleged. It is therefore ordered and adjudged by the court that the judgment in this cause given and rendered by the court below be and the same is, in all things, affirmed.

And the said Appellant, William Miller, having given an undertaking on appeal, conditioned to pay whatever judgment was rendered and affirmed against him in this court with H. T. Husted

as surety, it is further ordered that the said respondent recover off and from the said William Miller and H. T. Husted his surety on appeal the sum of Three Thousand, Three Hundred and Fifty-Nine Dollars and Ninety-Seven Cents, ($3359.97) and the
105 further sum of $490.00 his costs and disbursements in the court below, and that said sums bear interest at the rate of six per cent. per annum since the 4th day of May, 1907, and also that he recover off and from said appellant and his said surety and off and from the First National Bank of Payette, Idaho, and J. T. Clement, its surety on appeal his costs and disbursements in this court taxed at $81.00.

And it is further ordered that this cause be remanded to the court below from which this appeal was taken with directions to enter a judgment in accordance herewith.

106 In the Supreme Court of the State of Oregon.

WILLIAM MILLER, Plaintiff in Error,
vs.
WILL R. KING, Substituted for the First National Bank of Payette, Idaho, Defendant in Error.

On Writ of Error from the Supreme Court of the United States.

Assignment of Errors.

Now comes the said William Miller, plaintiff in error, by his attorneys, and respectfully submits that in the record, proceedings, decision, and final judgment of the Supreme Court of the State of Oregon, in the above entitled matter, there is manifest error, in this, to-wit:

1. That said Supreme Court erred in adjudging and deciding that there was no law preventing the First National Bank of Payette, Idaho, predecessor in interest of Will R. King, defendant in error, from taking an assignment of a judgment for collection only and without compensation and agreeing to pay the proceeds thereof, when collected, to a third person.

2. That said Supreme Court erred in adjudging and deciding that the First National Bank of Payette, Idaho, could take and acquire the legal title to a judgment assigned to it merely for the purpose of collection, and not taken or acquired in the regular course of business, and for the collection of which said bank was to receive no compensation.

3. That said Supreme Court erred in adjudging and deciding that the assignment to the First National Bank of Payette, Idaho, of a judgment for the purpose of collection only, and in the collection of which the said bank had no beneficial interest, could not be revoked by the assignor and judgment creditor.

107 4. That said Supreme Court erred in adjudging and deciding that the motions filed in the trial court for the dis-

missal of said action by the First National Bank of Payette, Idaho, and by William Miller, the plaintiff in error, were properly denied and overruled by the said trial court.

5. That the said Supreme Court erred in not adjudging and deciding that the First National Bank of Payette, Idaho, could not maintain or prosecute an action based on the assignment to it of the judgment described in the complaint filed in this cause.

6. That said Supreme Court erred in adjudging and deciding that the defendant in error, Will R. King, acquired some title, right, or interest, or could maintain or prosecute the said action, under or by reason of the assignment from the First National Bank of Payette, Idaho, of the Judgment described in the complaint filed in this cause.

7. That the Supreme Court erred in holding and deciding that the First National Bank of Payette, Idaho, could act as Trustee of an express trust, in which said bank, had no beneficial interest.

8. That said Supreme Court erred in not holding and deciding that the First National Bank of Payette, Idaho, acquired no title, right, or interest, under the assignment from Henry Helmick, dated April —, 1903, to what is known as the Porter Judgment, being the judgment obtained by said Helmick against one Porter in the Circuit Court of Malheur County, Oregon, on the 11th day of April, 1903.

9. That said Supreme Court erred in not holding and deciding that the revocation executed by Henry Helmick on the 25th day of September, 1903, and filed for record on the 29th day of September, 1903, in the County Recorder's Office of Malheur County, Oregon, being Exhibit "N" introduced upon the trial of said cause by plaintiff in error, did not divest the First National Bank of Payette, Idaho, of all right, title and interest acquired by it under the assignment described in subdivision eight thereof.

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10. That said Supreme Court erred in not holding and deciding that the trial court erred in not admitting in evidence Exhibits "O" and "P," and each of them, offered in evidence by the plaintiff in error, William Miller, and in not permitting the plaintiff in error, William Miller, to show that he had paid the proceeds of the judgment collected by him, to the Moss Mercantile Company, at the request and at the direction of the judgment creditor, Henry Helmick, and in not permitting the plaintiff in error, William Miller, to show that payment by him of the proceeds of the said judgment to the said Moss Mercantile Company, was ratified and approved by the said Henry Helmick, the judgment creditor; and said Supreme Court erred in not reversing the said trial court and setting aside the said judgment for the reasons herein stated.

11. That said Supreme Court erred in not setting aside the judgment rendered by the trial court, and ordering a dismissal of said action.

12. That the judgment of said Supreme Court is repugnant to and in conflict with the laws of the United States, and especially the Act of Congress known as "The National Bank Act," and relating to the organization, powers, and duties of National Banks, being

Sections 5133 to 5243 of the Revised Statutes of the United States, and acts amendatory thereof.

13. That the judgment of said Supreme Court of the State of Oregon is repugnant to and in conflict with Section 5136 of the Revised Statutes of the United States, and the acts amendatory thereof.

14. That plaintiff in error further says: That in the aforesaid action there was drawn in question the power and authority of a National Banking Corporation, incorporated and doing
109 business under an act of Congress known as "The National Bank Act," your plaintiff in error contending that the said First National Bank of Payette, Idaho, the predecessor in interest of Will R. King, the defendant in error, had no right, power, or authority under the laws of the United States to take or acquire an assignment of the judgment described in the complaint filed herein, either in trust for others, or for collection only, it clearly appearing under the evidence that the said bank had no beneficial interest whatsoever in the said assignment or in the proceeds of the said judgment; and your plaintiff in error contended that the assignment to the said bank of the said judgment was revoked and could be revoked by the assignor and judgment creditor and that said bank could not prosecute said action, and could not assign the right to prosecute the same, or assign the cause of action described in the said complaint, to the said defendant in error, Will R. King, and the plaintiff in error further contended that the payment by him of the proceeds of the judgment described in the complaint filed in this cause was made at the direction and request of the judgment creditor, and was ratified and approved by such judgment creditor, and said Supreme Court of the State of Oregon, by its final decision in this cause, held and decided adversely to, and against the contention so made by your plaintiff in error; and held and decided adversely to the rights and immunities claimed by the plaintiff in error under the said laws and Statutes of the United States, to which judgment and decision plaintiff in error hereby excepts, and assigns the same as errors.

Wherefore, for these and other manifest errors appearing in the record, the said William Miller, plaintiff in error, prays that the judgment of the said Supreme Court of the State of Oregon be reversed and set aside, and held for naught, and that judg-
110 ment be rendered for plaintiff in error, granting him his rights under the statutes and laws of the United States, and that he be restored to all things which he has lost by this action and because of the said judgment and decision, and that he may have judgment for his costs.

WILLIAM MILLER,
J. H. RICHARDS,
OLIVER O. HAGA,
Attorneys for William Miller, Plaintiff in Error.

Office First National Bank Bldg., Boise, Idaho.

(Endorsed:) Filed Sep. 2, 1909. J. C. Moreland, Clerk. By Arthur S. Benson, Deputy.

111 In the Supreme Court of the State of Oregon.

WILLIAM MILLER, Plaintiff in Error,
vs.
WILL R. KING, Substituted for the First National Bank of Payette, Idaho, Defendant in Error.

Petition for Writ of Error.

To the Honorable Frank A. Moore, Chief Justice of the Supreme Court of the State of Oregon:

Comes now the above-named William Miller, plaintiff in error, and complains and alleges:

That on the 6th day of October, A. D. 1908, the Supreme Court of the State of Oregon rendered a final judgment against your petitioner, the said William Miller, in a certain cause wherein the said William Miller was appellant and the said Will R. King was respondent, for three thousand eight hundred and forty-nine dollars and ninety-seven cents ($3,849.97), with interest at 6% per annum from May 4, 1907, and for costs; and thereafter a petition for re-hearing was filed, presented and considered, and on the 12th day of January, A. D. 1909, denied by said Court, whereupon said judgment became final.

That said William Miller was and is aggrieved in that, in said judgment and the proceedings had prior thereto in this cause, certain errors were committed to his prejudice; that the said final judgment and decision of the Supreme Court of the State of Oregon deprived the said William Miller, who now is and then
112 was a citizen of the United States, of rights, privileges and immunities secured to him and other citizens of the United States under the Act of Congress of the United States, known as "The National-Bank Act," and the acts amendatory thereof; that the said William Miller urged and contended in said Supreme Court of the State of Oregon and in the said cause that the predecessor in interest of the said Will R. King, to-wit, the First National Bank of Payette, Idaho, a corporation incorporated under the said National-Bank Act, had no power of authority under the laws of the United States to take or acquire an assignment of the judgment described in the complaint filed in said cause, either in trust for others or for collection only.

That it appeared from the evidence in said cause that the said Bank had no beneficial interest whatsoever in the judgment so assigned to it or in the said cause of action or in the results of said action, and the said William Miller further contended that, under the facts and by reason of said National-Bank Act and the laws of the United States, the said First National Bank of Payette, Idaho, had no power or authority to assign the said cause of action set out in the complaint filed in said cause, or the said judgment, to the said Will R. King, and that by reason thereof, the said Will R. King could not maintain or prosecute said action. All of which

will more fully appear by reference to the record and proceedings in said cause and from the assignment of errors filed herewith.

That the said Supreme Court of the State of Oregon is the highest court in the said state, in which a decision in said action could be had.

And your petitioner claims the right to remove said judg-
113 ment to the Supreme Court of the United States by Writ of Error under Section 709 of the Revised Statutes of the United States, because and for the reasons above set forth and as appear more fully from the said assignment of errors and by the record in said cause.

Wherefore, Your petitioner prays for the allowance of a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Oregon and the judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States, and the errors complained of by your petitioner may be examined and corrected and said judgment reversed and set aside, and for citation and supersedeas; and your petitioner will ever pray.

WILLIAM MILLER,
Petitioner,
By J. H. RICHARDS,
WILLIAM MILLER and
OLIVER O. HAGA,
His Attorneys.

114 The Supreme Court of the State of Oregon.

WILLIAM MILLER, Appellant,
vs.
WILL R. KING, Substituted for the First National Bank of Payette, Idaho, Respondent.

Order Allowing Writ of Error.

The above-entitled matter coming on to be heard upon the petition of the Appellant therein for a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Oregon, and upon examination of said petition and the record in said matter and the assignment of errors filed herewith, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter,—

It is ordered that a Writ of Error as prayed for in the foregoing petition be, and is hereby, allowed to this Court from the Supreme Court of the United States, said Writ to operate as a supersedeas, and the bond for that purpose, in accordance with the written stipulation of the parties now exhibited to me, is fixed at the sum of Thirteen Thousand Dollars ($13,000.00).

Dated at Salem, Oregon, this 30th day of August, 1909.

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

115 [Endorsed:] Filed Sept. 2, 1909. J. C. Moreland, clerk. By Arthur S. Benson, deputy.

116 Fidelity and Deposit Company of Maryland. Home office, Baltimore, Maryland.

In the Supreme Court of the United States.

WILLIAM MILLER, Plaintiff in Error,
vs.
WILL R. KING, Substituted for the First National Bank of Payette, Idaho, Defendant in Error.

Bond.

Know All Men by These Presents, That the Fidelity and Deposit Company of Maryland, as surety, is held and firmly bound unto Will R. King, in the sum of Thirteen Thousand ($13,000.00) Dollars, to be paid to the said obligee, his heirs, executors, administrators, successors, representatives, or assigns, to the payment of which well and truly to be made, we bind ourselves, our successors, and assigns, firmly by these presents.

Sealed with our seals, and dated this 31st day of August, A. D. 1909.

Whereas, The above named Plaintiff in Error has prosecuted a Writ of Error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Oregon.

Now, Therefore, The condition of this obligation is such that if the above named Plaintiff in Error shall prosecute the said Writ of Error to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

117 FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By ROBERT T. PLATT,
Attorney in Fact.

Attest:
[Company seal.] W. J. CLEMENS, *Agent.*

Signed, sealed and delivered in the presence of
W. J. LYONS.
E. LIEMAN.

STATE OF OREGON,
County of Multnomah, ss:

This certifies, that on the 31st day of August, 1909, before the undersigned, a Notary Public in and for Oregon, personally appeared the within named W. J. Clemens, Agent, and Robert T. Platt, Attorney in Fact, of the Fidelity and Deposit Company of Maryland,

the corporation mentioned in and which executed the foregoing instrument and acknowledged that they executed the same by the authority and on behalf of said Fidelity and Deposit Company of Maryland pursuant to a resolution of the Board of Directors of said corporation, duly adopted on the 6th day of July, 1898; and W. J. Clemens, the Agent of the Fidelity and Deposit Company of Maryland, further acknowledged that the Corporate Seal hereinbefore attached and impressed herein is the Corporate Seal of said Corporation and was affixed thereto by him.

In testimony whereof, I have hereunto set my hand and notarial seal this 31st day of August, 1909.

[NOTARY SEAL.] W. J. LYONS,
Notary Public.

I hereby approve the foregoing bond and surety, this 31st day of August, 1909.

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

(Endorsed:) Filed Sep. 2, 1909. J. C. Moreland, Clerk, By Arthur S. Benson, Deputy.

118 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Oregon, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Will R. King, substituted for the First National Bank of Payette, Idaho, plaintiff and respondent, and William Miller, defendant and appellant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under,
119 the United States, and the decision was against the title, right, privilege, or exemption specially set up or claim under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said William Miller, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and

proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same at Washington, on the 28th of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 31st day of August, in the year of our Lord one thousand nine hundred and nine.

Done in the City of Portland, County of Multnomah, with the seal of the Circuit Court of the United States for the District of Oregon attached.

[Seal United States Circuit Court, Oregon.]

G. H. MARSH,
Clerk of the Circuit Court of the United States, District of Oregon.
By J. W. MARSH, *Deputy.*

Allowed by
FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

120 [Endorsed:] Filed Sep. 2, 1909. J. C. Moreland, Clerk By Arthur S. Benson, Deputy.

121 THE UNITED STATES OF AMERICA, ss:

The President of the United States to Will R. King, Oregon, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington within sixty days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Oregon, wherein William Miller is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Oregon, at Salem, this 31st day of August, 1909.

[Seal Supreme Court, State of Oregon, 1859.]

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

Attest:
J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon,
By ARTHUR S. BENSON, *Deputy.*

STATE OF OREGON,
County of Multnomah, ss:

I, the undersigned, attorney of record for the defendant in error in the above-entitled cause, hereby acknowledge due service of the above citation.

Dated this 31 day of August, 1909.

C. E. S. WOOD,
Attorney for Will R. King, Ch. Com. Bldg., Portland, Oregon.

122 [Endorsed:] Filed Sep. 2, 1909. J. C. Moreland, Clerk By Arthur S. Benson, Deputy.

123 In the Supreme Court of the State of Oregon.

WILLIAM MILLER, Plaintiff in Error,
vs.
WILL R. KING, Substituted for the First National Bank of Payette, Idaho, Defendant in Error.

Stipulation as to Record.

It is hereby stipulated and agreed by the parties hereto that in order to save expense in the printing and certification of the record, the following portions of the record and no more, the same being sufficient to show the errors complained of, shall be certified and sent to the Clerk of the Supreme Court of the United States by the Clerk of the Supreme Court of the State of Oregon in obedience to the Writ of Error issued herein, to-wit:

1. Complaint.
2. Amended Answer.
3. Reply.
4. Motion for substitution in the Supreme Court with Exhibits "A" and "B" thereto attached, consisting of Affidavit of Will R. King and copy of written assignment from the First Nat'l Bank of Payette to King, together with the nunc pro tunc order in the Supreme Court making such substitution, also order of substitution in the Circuit Court for Malheur County, Oregon.
5. Motion of defendant in trial court to dismiss action, and copy of release thereto attached.
6. Order overruling motion to dismiss.
7. Supplemental Answer.
8. Order of Substitution.
9. Judgment.
10. Bill of Exceptions, not including, however, what is

124 referred to in the certificate of the Judge to the bill of exceptions as Exhibit "A," the same being a complete transcript of all the testimony, and omitting also from said bill of exceptions the following: Commencing with the words, "A paper shown wit-

ness," in line 6 from the top of page 55 of record in the Supreme Court of Oregon in said cause, and ending with the words, "I think he did not sign it" in line 2 from the bottom of page 58 of said record.

11. Petition for Writ of Error, showing allowance thereof.
12. Assignment of Errors.
13. Writ of Error.
14. Order Granting Writ of Error.
15. Bond on Writ of Error.
16. Citation and Acceptance of Service.
17. Opinion of the Supreme Court of Oregon in the above cause.

It is also stipulated and agreed:

a. That in the brief of appellant filed in the Supreme Court pursuant to the rules of such Court, the following assignment of error was made by appellant: "The Court erred in instructing the jury that if the Bank took the assignment from Helmick upon a trust to pay a portion of the money received thereunder to Lauer, the authority of the Bank could not be revoked or the assignment rescinded or disaffirmed (p. 97, LL. 32-34), for the reason that, under the law, a bank cannot act as trustee under an express trust, and for the reason that there was no allegation in the pleadings that the assignment was made to the Bank in trust for Lauer."

b. That in the said brief of appellant, under the title, "Points and Authorities," appellant stated that "A National Bank cannot act as trustee under an express trust, and he takes no title under an assignment of a judgment to it for such purpose. A contract of trusteeship thus created, or attempted to be created, is ultra vires and void, and no action can be maintained thereon by or against the Bank. (Citing Cases)."

125 It shall not be necessary to give the verification of the pleadings in the trial court, or to show the acceptance of service by the attorneys, or to give endorsements thereon, but it shall be sufficient to note after each pleading that it was "duly verified", and to give the date of filing.

It is further stipulated and agreed that if, from oversight or omission, any necessary part of the record has been omitted, including any part of the records above mentioned, if hereafter by either party deemed material, from the record certified and returned to the Clerk of the United States Supreme Court in compliance with said Writ of Error, the parties hereto shall have the right, and the plaintiff in error may be required by the defendant in error, to cause to be certified and returned to, or lodged with, the Clerk of the Supreme Court of the United States any further or additional portions of the record.

Dated this 11th day of October, 1909.

WILLIAM MILLER,
J. H. RICHARDS,
OLIVER O. HAGA,
Counsel for Plaintiff in Error.
WILL R. KING,
Defendant in Error.

126 [Endorsed:] In the Supreme Court of the State of Oregon. William Miller, Plaintiff in Error, vs. Will R. King, Substituted for the First National Bank of Payette, Idaho, Defendant in Error. Stipulation as to Record. Filed October 14th, 1909. J. C. Moreland, Clerk. By Arthur S. Benson, Deputy.

127 STATE OF OREGON,
County of Marion, ss:

I, J. C. Moreland, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing transcript is a full, true and complete copy of the record of said action certified to and filed with our said court, as the transcript on appeal from the judgment of the circuit court of the State of Oregon for the county of Malheur, from which said appeal was taken, and is the record and transcript upon which said appeal was heard, excepting therefrom such portions of the record eliminated in accordance with stipulation of parties contained herein.

I further certify that the foregoing transcript likewise contains a full, true and correct copy of the opinion filed by our Supreme Court, and of the judgment entered thereon in this court on the 6th day of October 1908.

I further certify that the Assignment of Errors and Bond on Appeal, which are attached to the above and foregoing have been by me compared with the originals thereof, and that they are true and correct copies of such originals as the same appear of record and on file in my office and in my custody.

I further certify that the Petition for Writ of Error, the Writ of Error, and Citation with service endorsed thereon, all of which are attached to the foregoing, are the original Petition for Writ of Error, Writ of Error and Citation lodged with and filed in my office, and that the foregoing transcript is a true and correct copy of the papers and pleadings filed and of the proceedings had in the above entitled cause in our said court as the same appears of record and on file in my office.

128 I further certify that the stipulation as to record which is attached to the foregoing record at page 123 is the original Stipulation lodged with and filed in my office on the 14th day of October 1909.

I further certify that the cost of the foregoing return to Writ of Error is $55.75 and that said amount was paid by Richards & Haga attorneys for the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and the seal of the Supreme Court of the State of Oregon, at my office in the City of Salem, in said State, this the — of October 1909.

[Seal Supreme Court, State of Oregon, 1859.]

J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.

Endorsed on cover: File No. 21,883. Oregon Supreme Court. Term No. 153. William Miller, plaintiff in error, vs. Will R. King, substituted for the First National Bank of Payette, Idaho. Filed October 28, 1909. File No. 21,883.

Supreme Court of the United States

OCTOBER TERM, 1911

No. 153

WILLIAM MILLER, PLAINTIFF IN ERROR,

vs.

WILL R. KING, SUBSTITUTED FOR THE FIRST NATIONAL BANK OF PAYETTE, IDAHO.

BRIEF OF PLAINTIFF IN ERROR

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

JAMES H. RICHARDS,
OLIVER O. HAGA,
Attorneys for Plaintiff in Error.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE

Supreme Court of the United States

OCTOBER TERM, 1911

No. 153

WILLIAM MILLER, PLAINTIFF IN ERROR,

vs.

WILL R. KING, SUBSTITUTED FOR THE FIRST NATIONAL BANK OF PAYETTE, IDAHO.

BRIEF OF PLAINTIFF IN ERROR

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

STATEMENT OF THE CASE.

This action was commenced in the Circuit Court for Malheur County, Oregon, by the First National Bank of Payette, Idaho, against William Miller, the plaintiff in error, on July 27, 1903, and the action was prosecuted by the bank in its own name until in May, 1907, when the defendant in error, Will R. King, was substituted as plaintiff in the Trial Court. The substitution was based upon an alleged assignment of the cause of action from the Bank.

The facts, so far as they are material to an understanding of the case, are as follows:

In April, 1903, one Henry Helmick secured a judgment in the Circuit Court of Malheur County, Oregon, against O. W. Porter. In that action the plaintiff in error, William Miller, was one of the attorneys for said Henry Helmick, and the defendant in error, Will R. King, was attorney for said O. W. Porter. Upon the trial of that case, evidence was introduced to the effect that said Helmick was indebted to the Moss

Mercantile Company and that the money which he might recover on his judgment against Porter should be paid to said Company.

In June, 1903, Porter paid the judgment which Helmick had secured against him, to the Clerk of the Court, who later paid the same to William Miller, one of the attorneys for said Helmick, and Miller, plaintiff in error herein, thereupon paid it, pursuant to previous instructions from said Helmick, to the Moss Mercantile Company, less his own fees of Two Hundred Dollars, which he was authorized to deduct.

Sometime after Helmick had recovered his judgment against Porter and before such judgment was paid by Porter, Helmick executed an assignment of such judgment to the said First National Bank of Payette, Idaho. The assignment was made without any consideration whatsoever being paid therefor by the bank (Record pages 20-21, 26, 42, 43, 46) Helmick was not a customer of the bank and the bank had no interest whatsoever in such judgment. (Record pages 28, 50.) It was not even to receive a commission or compensation for the collection of the judgment. (Record pages 29, 42, 51.)

At the time the judgment was assigned to the bank, the latter executed a written memorandum addressed to Helmick stating that the proceeds of the judgment when collected should be subject to the order of Helmick. (Record page 26.) There is some testimony that the bank had oral instructions given it at the time the assignment was made that it should pay Six Hundred Dollars out of the judgment to one J. A. Lauer and that the balance or about Twenty-three Hundred Dollars should be paid to Helmick, but it is admitted that the bank had no interest whatsoever either as commission or otherwise in the judgment.

When the bank learned that the plaintiff in error had collected the Porter judgment and paid the proceeds to the Moss Mercantile Company, it brought this action against plaintiff in error herein for the ful amount of the judgment. Within two months after the bank had instituted its action, and long before the same was called for trial, Henry Helmick, the judgment creditor, executed and filed for record in the Clerk's Office for Malheur County, a revocation of the assignment to the bank, revoking all authority which he had previously given the bank under the assignment above mentioned, (Record page 38) and at the same time, or within a few days thereafter, the said Henry Helmick had a full and complete settlement with the Moss Mercanile Company, including therein the monies which it had received from the plaintiff in error.

William Miller, being the identical money for which the bank was maintaining this action against Miller. (Record pages 39 and 40.) In this settlement, Henry Helmick ratified, approved, and confirmed the action of William Miller, plaintiff in error, in paying such money to the Moss Mercantile Company. Notwithstanding the revocation of the assignment to the bank and the final settlement above mentioned, the bank continued to prosecute its action against Miller and secured a judgment against him which was afterwards reversed by the Supreme Court of Oregon.

In March, 1906, the bank, without receiving any consideration whatsoever therefor, purported to assign to the defendant in error, Will R. King, its attorney in the action which it was prosecuting against Miller, the judgment which Helmick had previously assigned to the bank and which assignment he had previously revoked.

In April, 1907, the directors of the bank passed a resolution instructing the officers of the bank to dismiss the action (Record pages 46-47), and pursuant to such resolution the officers of the bank on April 24, 1907, gave plaintiff in error a release in full of all demands, and the attorneys for plaintiff in error moved the trial court for an order dismissing the action based upon such release, (Record pages 14-15), which motion was overruled. When the case was called for trial the attorneys for the bank protested against the further prosecution of of the action and moved a dismissal thereof at the cost of the bank, which motion was overruled. (Record pages 19-20.) The defendant in error was then substituted for the bank by the trial court, as plaintiff in the case. Upon the trial, judgment was recovered against plaintiff in error and such judgment was affirmed by the Supreme Court of Oregon.

The contention of plaintff in error that a national bank had no power or authority under its charter to take an assignment of a judgment solely for the purpose of collection, without compensation or commission, and to hold the proceeds thereof when collected in trust for others or as a trustee of an express trust was decided adversely to Miller by the Oregon Supreme Court. Plaintiff in error contended that the action of the bank was *ultra vires* and void or at least voidable, and that the assignment having been made to the bank without consideration being paid therefor and the bank having no interest in such assignment or judgment, its authority in the premises was in all events revoked by the revocation executed and filed with the clerk of the court by the judgment creditor, Henry Helmick.

These contentions, as stated above, were decided adversely to plaintiff in error, who now seeks the decision of this Court upon the question as to whether the action of the bank is within the power or authority conferred upon national banks by the National Banking Act and whether the defendant in error acquired any title to the cause of action or to the judgment which Helmick, in April, 1903, purported to assign to the bank, and which he in September, 1903, by an equally solemn instrument, revoked and annulled and at the same time confirmed, ratified and approved the action of plaintiff in error in paying the money to the Moss Mercantile Company and which was thereupon settled and adjusted in his final settlement with said Company.

ERRORS RELIED ON.

1. That the Supreme Court of Oregon erred in adjudging and deciding that the First National Bank of Payette, Idaho, predecessor in interest of defendant in error, could take and acquire legal title to a judgment assigned to it merely for the purpose of collection, and not taken or required in the regular course of business, and for the collection of which, said bank was to receive no compensation.

2. That the Supreme Court of Oregon erred in adjudging and deciding that the assignment of Helmick to the First National Bank of Payette, Idaho, of a judgment for the purpose of collection, and in the collection of which the bank had no beneficial interest, could not be revoked by the assignor and judgment creditor.

3. That the Supreme Court of Oregon erred in adjudging and deciding that the motions filed by the plaintiff in error and by the bank in the trial court for the dismissal of the action were properly denied and overruled by the trial court.

4. That the Supreme Court erred in not adjudging and deciding that the bank could not maintain or prosecute an action based on the assignment to it of the judgment described in the complaint.

5. That the Supreme Court erred in adjudging and deciding that the defendant in error, Will R. King, acquired some title, right or interest, or could maintain or prosecute the said action under or by reason of the assignment to him from the First National Bank of Payette, Idaho, of the judgment described in the complaint herein.

6. That the Supreme Court erred in holding and deciding that a national bank can act as a trustee of an express trust, in which trust the bank has no beneficial interest.

7. That the Supreme Court erred in not holding and deciding that the taking of the assignment by the bank from Henry Helmick was *ultra vires* and void and vested no title in the bank, and that the assignment thereof from the bank to defendant in error vested no title or interest in the defendant in error.

8. That the Supreme Court erred in not holding and deciding that if any title was acquired by the bank under the assignment from Helmick, the same was revoked by the revocation thereof, filed by Henry Helmick with the clerk of the court on September 29, 1903.

9. That the Supreme Court erred in not holding and deciding that the trial court should have admitted in evidence Exhibits "O" and "P", offered in evidence by plaintiff in error, and in not holding and deciding that the trial court erred in not permitting plaintiff in error to show that he had paid the proceeds of the judgment, collected by him, to the Moss Mercantile Company at the request and at the direction of Henry Helmick, the judgment creditor, and in not permitting plaintiff in error to show that the payment by him of the proceeds to said Moss Mercantile Company was ratified and approved by said Henry Helmick.

10. That the Supreme Court erred in not setting aside the judgment rendered by the trial court and ordering a dismissal of the action.

ARGUMENT.

A national bank cannot act as trustee under an express trust.

It is alleged in the complaint and not denied in the answer that the First National Bank of Payette, Idaho, was a national bank, incorporated under the banking laws of the United States. The action was brought by the bank in its own name upon an assignment to it of a judgment in which assignment or judgment it had no beneficial interest. The claim is now made that it had assumed a trust of such character that when it had gratuitously collected the money called for by the judgment, it was to pay part of it to one J. A. Lauer and part of it to the judgment creditor. While this is directly contrary to the written receipt which it gave the judgment creditor at the time the assignment was made (Record, page 26), yet for the sake of argument, it may be assumed that it had received instructions from Helmick, the judgment creditor, to pay $700.00 out of the moneys collected on the judgment to said Lauer.

The power of the bank to act as trustee of an express trust in a matter in which it has no interest whatsoever and without compensation or remuneration for any services rendered or to be rendered, must be found, if at all, in the statutes of the United States under which the bank was chartered.

The actions of the bank in this matter and the contract which it is pretended or claimed was entered into are clearly *ultra vires* and are not binding upon either the bank or the other parties to the contract.

Section 29 of Lord's Oregon Laws reads as follows:

> "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section."

It will be noted that if the Bank was trustee in the premises it was trustee under an express trust. That a national bank cannot legally accept such trust and undertake to carry out and perform the multifarious duties of a trustee, is sustained by an unbroken line of authorities. In the authorities hereinafter cited, where this matter has been involved, the Courts have assumed as unquestionably the law that a national bank cannot enter into a valid contract to act as trustee in such matters.

This Court in the case of Central Transportation Co. vs. Pullman Palace Car Co., 139 U. S. 24; 35 L. Ed. 55 in discussing the subject of *ultra vires*, said:

> "The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: The obligation of every one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. * * *
>
> "A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of

its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection of the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

The doctrine announced in the above case has been repeatedly approved by this Court and by the State Courts:

McCormick vs. Market Nat. Bank, 165 U. S. 538, 41 L. Ed. 817.
Cal. Bank vs. Kennedy, 167 U. S. 362; 42 L. Ed. 198.
Louisville, Etc., R. Co. vs. Louisville Trust Co., 174 U. S. 552, 43 L. Ed. 1081.
Concord Etc. Nat. Bank vs. Hawkins, 174 U. S. 364, 43 L. Ed. 1007.
Bowen vs. Needles Nat. Bank, 94 Fed. 925.
Chemical Nat. Bank vs. Havermale, 120 Cal. 604.
Kerfoot vs. Farmers & Merchants Bank, 218 U. S. 281, 54 L. Ed. 1042.
Citizens Nat. Bank vs. Appleton, 216 U. S. 196, 54 L. Ed. 443.

The doctrine of *ultra vires* as announced in the cases above cited have been applied most rigidly to banks operating under the national banking act.

This Court in Logan County National Bank v. Townsend, 139 U. S. 67, 35 L. Ed. 107, said:

"It is undoubtedly true, as contended by the defendant, that the national banking act is an enabling act for all associations organized under it, and that a national bank cannot rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established. The statute declares that a national banking institution shall have power to exercise, by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating

promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits, by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of Title 62 of the Revised Statutes."

In the case of California National Bank vs. Kennedy, 167 U. S. 362, 42 L. Ed. 198, it appeared that the California Bank was a stockholder in a Savings Bank and had received dividends on the stock held by it. Upon the failure of the Savings Bank to meet its obligations suit was brought against the stockholders and against the California National Bank, among others. Judgment against the Bank was recovered in the state court, and on writ of error the case was taken to the Supreme Court of the United States. This Court among other things said:

"It is settled that the United States statutes, relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted or which are incidental to carrying on the business for which they are established. Logan County National Bank vs. Townsend, *supra*. No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may in the usual course of doing such business accept stock of another corporation as collateral. * * *

"It is clear, however, that a national bank does not possess the power to deal in stocks. *The prohibition is implied from the failure to grant the power.* First National Bank vs. National Exchange Bank, 92 U. S. 128. * * *

"The claim that the bank in consequence of the receipt by it of dividends on the stock of the Savings Bank, is estopped from questioning its ownership and consequent liability is but a reiteration of the contention that the acquiring of stock by the bank under the circumstances disclosed was not void, but merely voidable. It would be a contradiction of terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void, could not be confirmed or ratified."

The judgment rendered by the state court against the Bank, in the above case, was reversed and set aside for the reasons above stated.

In Merchants' National Bank vs. Wehrmann, 202 U. S. 295, 50 L. Ed. 1036, the facts were that the bank, as *security* for the indebtedness due it, took nine shares in a partnership and afterwards in satisfaction of the debt became the owner of such shares. The partnership became involved in financial difficulties and the partners were called upon to pay the indebtedness, and the question arose as to the liability of the bank. This Court, as well as the Supreme Court of Ohio, held that the bank was without authority to acquire the stock and that this was a valid defense in an action to enforce its liability as a partner.

In First National Bank vs. Converse, 200 U. S. 425, 50 L. Ed. 537, the bank had acquired stock in a corporation as security for an indebtedness, and this court again held that the acquisition of the stock under the circumstances was *ultra vires*, and that the want of authority of a national bank to subscribe for capital stock in a speculative enterprise is a valid defense to an action against it to enforce its statutory liability as a stockholder.

The recent case of the Citizen's Central National Bank of New York vs. Appleton, 216 U. S. 196; 54 L. Ed. 443, is also in point. In that case the bank had guaranteed the payment of a note. This was held to be *ultra vires*, and it was further held that suit could not be maintained upon the guarantee or upon the *ultra vires* contract. The recovery against the bank in that case was not upon the contract of guarantee. The Court simply required the bank to return the money which it had received under the *ultra vires* contract; in other words, the rule was applied, that while the Court will not enforce an *ultra vires* contract, neither will it permit a person to retain the benefits which it may have received under such a contract; and while no suit can be maintained upon the void contract, the action may be maintained on an implied contract for the return of the moneys received under the *ultra vires* contract. The only section of the National Banking Act that can have any relation whatever to the contract under which the bank pretended to act in the case at bar is the 7th paragraph of Section 5136 of the Revised Statutes of the United States, which provides that National Banks shall have power:

> "To exercise by its Board of Directors, or duly authorized officers or agents, subject to law, of such incidental powers as shall be necessary to carry on the

> business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal property; and by obtaining, issuing and circulating notes according to the provisions of this Title."

All that portion of the above paragraph following the words, "to carry on the business of banking," must be held to be a limitation on the meaning of the phrase, "such incidental powers as shall be necessary to carry on the business of banking." The subsequent clauses and phrases enumerate such subjects as Congress considered incidental to the business of banking. No one can contend that the contracts entered into by the bank in the case at bar come within "such incidental powers *as shall be necessary to carry on the business of banking.*" It is not clear how it can promote the business of banking, or be necessary in carrying on such business, for a bank to take an assignment of a judgment from a person who is not a customer of the bank, and in which judgment the bank has no interest whatever, and for the collection of which it is not to receive any compensation, and which will involve the bank in almost endless litigation. It would seem that the services demanded in such cases come more within the license of a lawyer than the charter of a national bank.

This Court, in the case of Oregon Railway & Navigation Company vs. Oregonian Railway Company, 130 U. S. 32 L. Ed. 837, said:

> "It is to be remembered that where a statute making a grant of * * * powers * * * to a * * * a private corporation, becomes the subject of construction as regards the extent of the grant, the universal rule is that in doubtful points the construction shall be against the grantee and in favor of the * * * general public. As was said in the case of Chas. River Bridge vs. Warren Bridge, 36 U. S. 11 Pet. 420 (9:773): 'In this court the principle is recognized that in grants by the public nothing passes by implication.'"

In McCormick vs. Market National Bank, 165 U. S. 538, 549, 41 L. Ed. 817, 821, this court, in discussing the powers of banks, said:

> "The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers, is unlawful and void, and will not support

> an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of anyone contracting with the corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken; and above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law." (Citing cases.)

In that case, this court held that the lease which the bank had entered into was void and could not be made good by estoppel, and would not support an action to recover anything beyond the value of what the corporation had actually received and enjoyed.

In the case at bar, the conduct of the bank has been such that on the plainest principles of justice and equity, it should be condemned. The Bank has carried on this litigation for the sole purpose of vengeance and persecution, and has justified its conduct upon a technicality that can only bring the law into disrepute. Mr. Helmick assigned the judgment to the bank at the solicitation of the bank, and, in fact, for the purpose of defrauding a creditor, the Moss Mercantile Company, to whom it was understood and previously agreed that the plaintiff in error should pay the money, but within a few months after assigning the judgment to the bank, he revoked it and repudiated the action of the bank (Record p. 38) and ratified and confirmed the action of the plaintiff in error, who had, innocently and in good faith paid the money to the Moss Mercantile Company (Record pp. 39, 40.) Notwithstanding the revocation of its authority, the bank, without any beneficial interest in the judgment, proceeds with the prosecution of the action in defiance and in total disregard of the protests and efforts of Helmick to stop the proceedings; and when the particular official of the bank who was most interested in prolonging the litigation learned that he would be compelled to sever his connection with the bank because of a change in the stockholders, he caused the bank to execute an assignment, without any consideration to the bank, assigning the claim, or the right to harass and annoy the plaintiff in error, to the bank's attorney, Will R. King, defendant in error. It is true that at that time Henry Helmick had been prevailed upon to approve or consent to the assignment of the bank to King. Helmick, however, had, some two or three years prior thereto, revoked the authority of the bank and made a full settlement with the Moss Mercantile Company, in which settlement

he ratified and approved the payment made by plaintiff in error to such company, and he had therefore no longer any interest whatever in the judgment, and his consent to the assignment from the bank to King added nothing to its force; it simply shows the unconscionable methods which were resorted to in order to persecute plaintiff in error with further litigation. Helmick was simply led to believe that by joining with the bank he would get an additional sum if they should be successful in recovering judgment against Miller.

The doctrine of *ultra vires* was applied by the Circuit Court of Appeals of the Eighth Circuit in the case of Cooper vs. Hill, 94 Fed. 582, where the bank, after acquiring a mining property in satisfaction of the indebtedness due it, expended the funds of the bank in the development of the property. In that case the directors of the bank were held personally liable for the unauthorized use of the funds of the bank.

The Circuit Court of Appeals for the Ninth Circuit, in Bowen vs. Needles National Bank, 94 Fed. 925, held that a National Bank was not liable to the plaintiff, who had paid checks of a third person drawn on the bank in reliance on a promise which the bank had made plaintiff that it would cash the checks of such person. The court held that the contract was *ultra vires* on the part of the bank, and no action could be maintained on it.

Any contract or act of a National Bank beyond the powers expressly conferred upon it by the statute or fairly implied therefrom and necessary in order to carry on the banking business, is *ultra vires* and void.

Cases cited *supra*, and

Bowen vs. Needles Nat. Bank, 87 Fed. 430.
Commercial Nat. Bank vs. Pirie, 82 Fed. 709.
Farmers & Merchants Nat. Bank vs. Smith, 77 Fed. 129.
McCrory vs. Chambers, 48 Ill. App. 455.
Weckler vs. First Nat. Bank, 42 Md. 581.
First Nat. Bank vs. Ocean Nat. Bank, 60 N. Y. 278.
Wiley vs. First Nat. Bank, 47 Vt. 546.
Third Nat. Bank vs. Boyd, 44 Md. 47.
Dresser vs. Traders Nat. Bank, 165 Mass. 120.
Lazear vs. Nat. Union Bank, 52 Md. 78.
Norton vs. Bank, 61 N. H. 589.
Cumberland Etc. Co. vs. City of Evansville, 127, Fed. 187.
Davis vs. Old Colony R. R. Co., 131 Mass. 258.

The recent decision of this court in the case of Kerfoot vs. Farmers & Merchants Nat. Bank, et al, 218 U. S. 281; 54 L. Ed. 1042, sustains fully the contention of plaintiff in error in the case at bar. It is true that in that case another section of the statute was involved. That case involved the authority of a national bank to hold real property; and involved the construction of Section 5137 of the Revised Statutes of the United States. It is true that the court, in that case, said that if the bank acquired real property in contravenion of the statute, the conveyance to it would be voidable only, and not void, and that the sovereign alone could object, but the court expressly stated that the cases hereinbefore cited construing Section 5136, and applying the doctrine of *ultra vires*, did not have application to the facts which were involved in the Kerfoot case. In that case the bank had simply held the title in trust and had carried out the wishes of the trustor, who had since died, and the suit was brought against the *cestui que trust* for the purpose of *defeating the trust* and acquiring title to the property contrary to the intention of the trustor. The court simply applied the rule that a trust should not be permitted to fail and the property be diverted from those for whom it was intended, unless the statute, in express words or by clear legislative intent, compelled a construction to the effect that the conveyance of real property to the bank vested no title in the bank unless the conveyance was made for the specific purposes mentioned in Section 5137. The court also expressly recognized the rule that if such conveyances should be held void, it would unsettle titles to real property, and would work injustice on many people who had acquired title to real estate through national banks.

The doctrines upon which the court rests its decision in the Kerfoot case have no application to the case at bar. The facts here do not bring it within the rules of law applied in that case; but if it be conceded that the assignment to the bank was only voidable and not void, it would not change the situation in the slightest, for if it were voidable then it could be avoided, and if it could be avoided the revocation of the assignment and of the authority of the bank, made by Helmick in September, 1903, revoked whatever authority the bank had in the premises. If the assignment was void the revocation could not revoke it, for there was nothing to revoke, but if it was only voidable, then the revocation annulled it, and the settlement made with the Moss Mercantile Company immediately following the revocation took it out of the power of Helmick to revive the authority of the bank or of the defendant in error.

An ultra vires contract is void; not merely voidable.

When a contract is *ultra vires* as to one party to it, the other party to the contract may treat it as invalid. Since the only consideration for his promise is the invalid promise of the corporation, his promise is in legal effect without consideration, hence the rule that neither party is bound by a contract that is *ultra vires* as to one.

Central Transportation Co. vs. Pullman, 139 U. S. 24; 35 L. Ed. 55.

St. L. Etc. Co. vs. Terre Haute & I. R. Co. 145 U. S. 393; 36 L. Ed. 748.

Pittsburg, Etc. Ry. Co. vs. Keokuk, Etc. Co. 131 U. S. 371; 33 L. Ed. 157.

Jacksonville N. P. R. R. & M. Co. vs. Hooper 160 U. S. 514; 40 L. Ed. 515.

California Nat. Bank vs. Kennedy, 167 U. S. 362; 42 L. Ed. 198.

McCormick vs. Market Nat. Bank, 165 U. S. 538; 41 L. Ed. 817.

1 Page on Contracts, Section 310.

No action can be maintained on an ultra vires contract.

The contract upon which the bank brought this action being *ultra vires*, no action could be maintained thereon by the bank. This court, in the recent case of Citizens' Central Nat. Bank vs. Appleton, 216 U. S. 196; 54 L. Ed. 443, in discussing this question, said:

> "These views are supported by many other adjudged cases. In Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 60, 35 L. Ed. 55, 68, 11 Sup. Ct. Rep. 478, the court, speaking by Mr. Justice Gray, said: 'A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain

> such an action is not to affirm, but to disaffirm, the unlawful contract.' So, in Pullman's Car Co. v. Central Transp. Co. 171 U. S. 138, 151, 43 L. Ed. 108, 114, 18 Sup. Ct. Rep. 808, the court, speaking by Mr. Justice Peckham, said: 'The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or to make compensation for it.' "

In addition to the cases referred to by the court, the following may be cited as sustaining the proposition that no action could be maintained by the bank based on an assignment which it had no authority to accept:

Ashbury vs. Riche, L. R. 7 H. L. 653.

McCormick vs. Market Nat. Bank 165 U. S. 538; 41 L. Ed. 817.

De La Vergne Refrigerating Co. vs. German Savings Institute 175 U. S. 40; 44 L. Ed. 65.

Bosshardt vs. Crescent Oil Co. 171 Pa. St. 120.

Thomas vs. West Jersey Ry. Co. 101 U. S. 71; 25 L. Ed. 950.

Pa. R. R. Co. vs. St. L. & Co. 118 U. S. 290; 30 L. Ed. 83.

Revocation of Bank's Authority.

That the bank had no beneficial interest whatsoever in the judgment of Helmick against Porter, or in the assignment thereof to the bank, is admitted. The testimony is conclusive and uncontradicted on that proposition. The bank was not even to receive a commission for collecting the judgment. The assignment to the bank of the judgment merely constituted the bank the agent or attorney-in-fact of Helmick to collect the judgment and acknowledge satisfaction thereof on the records. The revocation of the bank's authority, executed by Helmick on September 25th, 1903, (Record p. 38) revoked all authority which the bank had in the matter.

This court, in discussing the power of the principal to revoke the authority of an agent in the case of Taylor vs. Burns, 203 U. S. 120, said:

> "As such an instrument, it was subject to revocation. It was not a power of attorney coupled with an interest. By the phrase, 'coupled with an interest,' is not meant an interest in the exercise of the power, but an interest in the property on which the power is to operate. Hunt vs. Rousmanier, 8 Wheat. 174; 5 L. Ed. 589."

This proposition is sustained, we believe, by all the authorities.

1 Clark & Skyles of Agency, Secs. 157-162 and 433.
Frink vs. Roe, 30 Cal. 296, 309.
2 Enc. L. & P. 1249-1250.

It is immaterial, in this case, whether the contract on which the bank sued, or under which it claims title, was void or voidable, for the authority of the bank to act in the premises was revoked by Helmick long before the bank attempted to transfer its interest or title in the judgment to the defendant in error, Will R. King; and long before the defendant in error took the assignment from the bank, the principal Henry Helmick, had divested himself of all title, right and interest in the Porter judgment, and ratified and approved the payment made by plaintiff in error to the Moss Mercantile Company. (Record pp. 39 and 40.)

The Court Erred in Excluding Testimony.

Under the authorities cited, the court erred in excluding Exhibits "O" and "P" of plaintiff in error (Record pp. 39-41), and other evidence offered by plaintiff in error, to show that he had paid the money to the Moss Mercantile Company upon the authority of Henry Helmick, and that his action in so doing had been ratified by said Helmick.

In conclusion, we respectfully submit that the judgment of the Supreme Court of Oregon should be reversed and the cause remanded, with instructions to dismiss. An affirmance of the judgment would lead to the conclusion that national banks may accept the multifarious duties of trustees and hazard their banking capital in failing to properly discharge such duties. No bank examiner could determine the solvency of the bank or its liabilities if such be the law.

Respectfully submitted,
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IN

The Supreme Court

of the United States

October Term 1911

WILLIAM MILLER, *Plaintiff in Error*

vs.

WILL R. KING, substituted for the First National Bank of Payette, Idaho, *Defendant in Error.*

No. 153

Brief of Defendant in Error

In Error to the Supreme Court of the State of Oregon

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Attorneys for Defendant in Error

WILL R. KING,
In Propria Persona

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The Supreme Court of the State of Oregon, speaking through its chief justice, Robert S. Bean, now a federal judge for the district of Oregon, states the facts in this case so clearly and concisely that we quote the same as our statement of this case, to-wit:

> "On April 11, 1903, Henry Helmick recovered judgment in the circuit court

for Malheur County, against O. W. Porter, for $2930.22, and costs. Defendant Miller was his attorney. On the 27th of the month Helmick, being indebted to one J. A. Lauer, assigned the judgment to the First National Bank of Payette, Idaho, for collection, the bank to pay the amount due Lauer from the money so collected, and to hold the balance subject to the order of Helmick. At the time of the assignment the bank gave [redacted] Helmick a writing, stating that it had received the judgment for collection, 'the proceeds of which, when collected, shall be subject to your order.' Immediately after the assignment the bank notified Miller thereof, and instructed him to collect the amount due on the judgment, deduct his fees, and remit the balance to it, which he agreed to do. On June 29th Miller made the collection, acknowledging satisfaction of the judgment on the record by signing the name of Helmick and of the bank, by himself as attorney, deducted $200 for his fee, but, in place of remitting the balance to the bank, paid it over to the Moss Mercantile Company, who claimed to have an assignment of the debt, upon which the judgment was based, prior in time to the bank. On July 13th Helmick and Lauer agreed in writing with the bank to indemnify it against the costs and expenses of the litigation, and on the 27th of the month the bank commenced an action against the defendant to recover the money collected by him, alleging in its complaint that the defendant was its agent and attorney, duly authorized by

it to collect and receive the money, and as such agent collected and received on the judgment the sum of $2930.22, of which amount he was duly authorized by plaintiff to retain $200 for his fees, and that he had failed and neglected to pay the balance over to it. On September 25th Helmick undertook to revoke in writing the assignment of the judgment to the bank, and to ratify and approve the action of defendant in paying the money collected thereon to the Moss Mercantile Company. Shortly thereafter the mercantile company commenced a suit in equity against the bank, to enjoin it from prosecuting its action at law against the defendant, but this suit was (on appeal) dismissed. Moss Mercantile Co. v. First National Bank, 47 Ore. 361, 82 Pac. 8, 2 L. R. A. (N. S.) 657. Defendant thereupon answered in the law action, denying that he collected the judgment, as agent of the bank, admitting the assignment of such judgment to the bank, but denying that it was for valuable consideration, and affirmatively alleging (1) that he was the agent of Helmick in the collection of the money, and collected the same at his request; (2) that prior to the assignment of the judgment to the bank, Helmick had assigned and transferred to the Moss Mercantile Company the debt upon which the judgment was based, of which the fact the bank had notice, and that Helmick instructed him to collect the money on such judgment and pay it to the mercantile company; (3) that the assignment to the bank was for collection only and without consideration; (4)

that it was made for the purpose of defrauding the mercantile company and that such company was the owner, and entitled to the proceeds of the judgment, and defendant had paid the money to it, which act was ratified and approved by Helmick; (5) the revocation by Helmick of the assignment of the judgment to the bank. A reply put in issue the averments of the answer, and a trial was had on March 13, 1906, which resulted in a verdict and judgment in favor of plaintiff for the amount prayed for in the complaint. On March 29th the bank, at the request of Helmick and Lauer, assigned the judgment to W. R. King, one of the attorneys, with the understanding and agreement that from the amount collected thereon, he would pay Lauer $1,943, the bank $100 to cover costs and expenses incurred by it in the litigation, his own fees and the costs of collection, and the balance to one Graham, for the benefit of Helmick. Defendant thereafter appealed from the judgment, and when the cause came on for hearing in this court, King appeared, and moved to be substituted as party plaintiff in lieu of the bank, setting out in his petition therefor the assignment of the judgment to him. Defendant consented to this application, and an order was thereupon made substituting King as plaintiff, and from that time on the cause proceeded under his name. On December 11th the judgment was reversed, and a new trial ordered. A cost bill was subsequently filed by defendant under the substituted title, and a mandate under such title was

issued and remitted to the court below. Before a retrial of the cause, however, the control of the bank had passed into the hands of the members of the Moss Mercantile Company, and on April 24, 1907, it executed a release to defendant of the cause of action, and by resolution directed its attorney to dismiss the action then pending. On April 25th, in pursuance of this resolution, the bank appeared in court by its counsel, and moved to dismiss the action, but such motion was overruled. Defendant thereupon filed a similar motion for the same reason, to which the bank assented, but this was likewise overruled. An order was afterwards made by the court below substituting Mr. King as plaintiff. Upon the trial judgment was rendered in his favor, from which defendant appeals."

Based upon these facts, the Oregon Supreme Court affirmed the judgment of the lower court and the defendant brings the case to this court on writ of error.

WANT OF JURISDICTION.

If the ground upon which the jurisdiction of the Supreme Court is invoked is that a title, right, privilege or immunity was claimed under the constitution, or a treaty, or a statute of or an authority exercised under the United States, and the decision was against such title, right, etc., the fact that the question was raised or claim made in the state court and was passed upon adversely to plaintiff in error, must appear from the face of the record:

Zadig v. Baldwin, 166 U. S. 485; 41 L. Ed. 1087.

Sayward v. Denny, 158 U. S. 180; 39 L. Ed. 941, 943.

Harding v. Illinois, 196 U. S. 78; 49 L. Ed. 394.

California Powder Works v. Davis, 151 U. S. 389; 38 L, Ed. 206, 207.

Schuyler Nat. Bank v. Bollong, 150 U. S. 87; 37 L. Ed. 1009.

What title, right, immunity or privilege of federal origin has been denied to plaintiff in error by the judgment of the Oregon Supreme Court?

Plaintiff in error says that the First National Bank of Payette, Idaho, was not authorized by Section 5136, Revised Statutes, to accept the assignment of the Helmick judgment, by reason of which want of authority, such assignment was void, and that the defendant in error deraigning title to said judgment through said bank by virtue of said assignment, cannot maintain this action against the plaintiff in error to recover the money collected on said judgment by the plaintiff in error; and that the determination of this question involves a consideration of Section 5136 of the Revised Statutes, being a portion of the National Bank Act.

Does this constitute such a federal question as will give this court jurisdiction?

The Oregon Supreme Court held that such assignment of the judgment in question was valid and that said bank and its successor in interest, the defendant in error, could maintain this action, but did not construe the National Bank Act, the opinion being based upon general principles of law. The record discloses that **no** issue, involving this question, was raised either by the pleadings or upon the introduction of said assignment in evidence in this case, or otherwise. As we understand the law and the rule of practice in this court, it must clearly appear from the record that this issue was raised in the state court, or this court

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is without jurisdiction to consider the merits of the contention of plaintiff in error. However, the record discloses on the contrary that the plaintiff in error admitted the assignment of said judgment to said bank and alleged that the assignment to the bank was for collection only and without consideration, and the Supreme Court of Oregon so construes the answer of the plaintiff in error. This appears on page 66 of the Transcript of the Record. In this cause Mr. Chief Justice Bean states his finding of fact thereon as follows:

> "Defendant thereupon answered in the law action, denying that he collected the judgment as agent of the bank, admitting the assignment of such judgment to the bank, but denying that it was for a valuable consideration, and affirmatively alleging * * * (3) that the assignment to the bank was for collection only and without consideration."

Upon trial of this cause in the Circuit Court for the County of Malheur, the plaintiff in error (the defendant therein) filed a motion for a directed verdict and in his sixth ground for such instruction (see page 35 of Transcript of Record herein) assigns the following reason therefor: "For the reason that the bank paid no consideration whatever for that assignment to it, all of which Mr. King knew; and an assignment of that character in trust for the assignor is void under the Oregon Statute."

Let us apply the law and the rule of practice of this court to this state of facts.

In discussing a like question **in re Sayward v. Denny,** 158 U. S. 180-185, 39 L. Ed. 941, 943, Mr. Chief Justice Fuller, delivering the opinion of this court, says:

> "But it nowhere affirmatively appears from the record that such right was set up or claimed in the trial court when the demurrer to the complaint was over-ruled or evidence admitted or excluded, or instructions given or refused, or in the Supreme Court in disposing of the rulings below. * * * We are not called on to revise these views of the principles of general law considered applicable to the case in hand. It is enough that there is nothing in the record to indicate that the state courts were led to suppose that plaintiff in error claimed protection under the constitution of the United States from the several rulings, or to suspect that each ruling as made involved a decision against a right specially set up under that instrument. And we may add that the decisions of state tribunals in respect to matters of general law cannot be reviewed on the theory that the law of the land is violated, unless their conclusions are absolutely free from error. Writ of error dismissed."

To the same effect is the opinion of Mr. Justice White, **in re Zadig v. Baldwin,** 166 U. S. 485, 488, 41 L. Ed. 1087, 1088, in which he says:

"It is clear, however, that we have no jurisdiction to pass upon questions presented in these assignments for the reason that it nowhere appears in the record that the plaintiffs in error at any time questioned the validity, under the constitution of the United States, of the section of the state constitution relied on to support the claim made against them, or in any manner specially set up or claimed the protection of any clause of the constitution of the United States.

"The contention that there was a federal question raised below finds its only support in the fact that there has been printed in the record, as filed in this court, what purports to be an extract from the closing brief of counsel presented to the Supreme Court of the state, in which such a federal question is discussed, and it is asserted orally at bar that in the oral argument made in the Supreme Court of California, a claim under the federal constitution was presented. But, manifestly, the matters referred to form no part of the record and are not adequate to create a federal question when no such question was necessarily decided below, and the record does not disclose that such issues were set up or claimed in any proper manner in the courts of the state. (Here are cited numerous authorities.) Dismissed for want of jurisdiction."

Mr. Justice Day, **in re Harding v. Illinois**, 196 U. S. 78, 86, 49 L. Ed. 394, 396, says: "It has been frequently held that in cases coming within this class less particularity is required

in asserting the federal right than in cases in the third class, wherein a right, title, privilege, or immunity is claimed under the United States, and the decision is against such right, title, privilege or immunity. In the latter class, the statute requires such right or privilege to be 'specially set up and claimed,'" citing with approval the opinion of Mr. Justice White **in re, Capital City Dairy Co. v. Ohio,** 183 U. S. 238, 248, 46 L. Ed. 171, 176, and quoting therefrom as follows:

> " 'It is settled that this court, on error to a state court, cannot consider an alleged federal question when it appears that the federal right thus relied upon had not been, by adequate specifications, called to the attention of the state court, and had not been by it considered, not being necessarily involved in the determination of the cause,'" citing the following cases: Green Bay & M. Canal Co. v. Patton Paper Co., 172 U. S. 58, 67, 43 L. Ed. 364, 368, 19 Sup. Ct. Rep. 97; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 654, 655, 41 L. Ed. 1149, 1151, 1152, 17 Sup. Ct. Rep. 709.

In re Schuyler Nat. Bank v. Bollong, 150 U. S. 87, 88, 37 L. Ed. 1009, the said bank was plaintiff in error claiming a right, title, privilege or immunity under the National Bank Act had been denied it by the state court, Mr. Justice Fuller, speaking for this court, says:

> "And it is not contended that the writ of error can be maintained except upon

> the theory that the decision of the state court was against some title, right, privilege or immunity claimed by plaintiff in error under the statutes of the United States. But by the requirements to the exercise of our jurisdiction of Section 709 of the Revised Statutes, the title, right, privilege, or immunity thus relied on must be specially set up or claimed in the state court at the proper time and in the proper manner. * * * It is true that the jurisdiction of the trial court was objected to, but that was on the confessedly untenable ground that the courts of the United States had exclusive jurisdiction in this class of cases, and therefore that the state courts had no jurisdiction over the subject matter, but no such contention as that before us was suggested.
>
> "This being so, without intending in any degree to intimate that the determination by the state courts that the petition was sufficient might have presented a question revisable by this court, we must direct the writ to be dismissed."

It follows, therefore, that the title, right, privilege or immunity claimed under the constitution, or treaty, or statute of the United States, must be specially set up in the state court and that fact must be clearly disclosed by the record. In the case at bar this has not been done. The record not only does not disclose that the alleged federal question was set up in the state court, but, on the contrary, it

does disclose that no federal question was raised or considered.

We submit, therefore, that the writ of error in this cause should be dismissed for want of jurisdiction.

ON THE MERITS.

We deem the authorities submitted on the foregoing pages must necessitate a dismissal of the cause without further investigation of the law affecting the case, but for the convenience of the court, if desired for consideration, points, authorities and argument in response to the contention of plaintiff in error, as presented in his brief, will follow:

POINTS AND AUTHORITIES.

1. Where the provisions of the National Bank Act prohibit certain acts without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States and not by private parties.

Kerfoot v. Farmers' & Merchants' Bank, 218 U. S. 281.

Union National Bank v. Matthews, 98 U. S. 621.

National Bank v. Whitney, 103 U. S. 99.

Xenia First National Bank v. Stewart, 107 U. S. 677.

Thompson v. St. Nicholas National Bank, 146 U. S. 240.

Union Gold Mining Co. v. Rocky Mt. Nat. Bank, 96 U. S. 240.

Fortier v. New Orleans Nat. Bank, 112 U. S. 439.

Logan County National Bank v. Townsend, 139 U. S. 77.

Reynolds v. Crawfordsville Nat. Bank, 112 U. S. 405.

Other authorities cited in 5 Fed. Statutes Ann. p. 83, note.

2. A National bank may engage in the business of collecting notes, bills of exchange, and other evidence of debt as an incident of the banking business although the authority is not expressly mentioned in the statute.

Mound City Paint Co. v. Commercial Nat. Bank, 4 Utah 353; 9 Pac. 709.

Logan County National Bank v. Townsend, 139 U. S. 67; 35 L. Ed. 107.

Keyes v. Hardin Bank, 52 Mo. App. 323.

Hanson v. Heard, 69 N. H. 190; 38 Atl. 789.

Newport Nat. Bank v. Board Ed. (Ky.), 70 S. W. 186.

Yerkes v. National Bank, 69 N. Y. 386.

White v. Cin. Third Nat. Bank, 7 Ohio Dec. 666.

Prescott v. Nat'l Bank, (Mass.) 32 N. E. 909.

3. A National bank may act as trustee of an express trust.

Kerfoot v. Farmers' & Merchants' Bank, 218 U. S. 281, 287; 54 L. Ed. 1042.

National Bank v. Matthews, 96 U. S. 621.

4. Section 5136, R. S., contains no prohibition against a National bank taking a judgment for collection and accepting an assignment thereof for that purpose.

5. The federal court will look beyond the federal question only when it has been decided erroneously and then only to see whether there are any other matters adjudged by the state court sufficiently broad to maintain the judgment.

McLaughlin v. Fowler, 154 U. S. 663; 26 L. Ed. 176.

Waters Pierce Oil Co. v. Texas, 212 U. S. 86, 99; 53 L. Ed. 417, 424.

Thompson v. St. Nicholas National Bank, 146 U. S. 240; 36 L. Ed. 959.

6. Questions of fact will not be reviewed on a writ of error from this court to the highest court of a state.

Waters Pierce Oil Co. v. Texas, 212 U. S. 86, 99, 100; 53 L. Ed. 417, 424, 425.

Eagan v. Hart, 165 U. S. 188, 189; 41 L. Ed. 680, 681.

Clipper M. Co. v. Eli M. Co., 194 U. S. 220; 48 L. Ed. 944, 948.

Kerfoot v. Farmers' & Merchants' Bank, 218 U. S. 281, 288; 54 L. Ed. 1042, 1044.

ARGUMENT.

Assuming for the purpose of this argument that the question raised is a federal one, and that the record discloses that it was properly raised in the state court, we will consider the merits of the issue presented.

Taking the view most favorable to plaintiff in error as to the alleged federal question, it might be stated thus: **Did the legal title to the judgment in question pass to the First National Bank of Payette, Idaho, by the assignment of said judgment to said bank by the judgment creditor, Helmick?**

Counsel for plaintiff in error argue that the National Bank Act, or rather Section 5136 thereof, has so limited the powers of such banks as to render said bank incapable of taking and holding the legal title to such judgment, even though the said bank took and held said legal title as a trustee of an express trust. **Can the plaintiff in error raise this question?** Assuming that such act on the part of the bank was ultra vires, **who** can raise that question? Not the plaintiff in error for he collected said judgment as attorney for said bank but refused to account to the bank or its assignee for the money so collected. If we should concede that either of the parties to such contract of assignment might have rescinded such contract (which

we do not concede), at any time before it was executed, it would not avail plaintiff in error for he is not a privy to either party to such contract of assignment other than agent for the bank in the collection of said judgment.

No doubt plaintiff in error will claim that he was not the agent of the bank in making such collection but the Oregon Supreme Court found to the contrary (Transcript, page 70), in these words:

> "In this case after the judgment had been assigned to the bank, it directed the defendant to collect the amount due thereon for it, and he agreed to do so."

See also statement by the court (Transcript, page 66).

After the assignment of a judgment is executed, the money due thereon collected by its agent and the whole transaction completed, can such agent refuse to pay the money so collected to his principal and defend an action brought against him therefor by his principal by setting up now that the act of the principal in accepting such assignment of said judgment was ultra vires? Suppose such act was ultra vires. Assume that the National Bank Act did impliedly prohibit said bank from accepting such assignment of said judgment, it imposes no penalty or forfeiture for such an act and when such transaction has been executed, the validity thereof can be questioned only by the government. This court has so held repeatedly. Per-

haps the latest expression of this court upon this point is found in re **Kerfoot v. Farmers' & Merchants' Bank**, 218 U. S. 281, 286, 54 L. Ed. 1042, 1043, where Mr. Justice Hughes, in considering the effect of a deed to real estate which was absolute in form and was executed to a National bank pursuant to an arrangement by which the title to said real estate was to be held in trust to be conveyed upon the direction of the grantor, says:

> "But while the purpose of this transaction was not one of those described in the statute for which a National bank may purchase and hold real estate, it does not follow that the deed was a nullity, and that it failed to convey title to the property.
>
> "In the absence of a clear expression of legislative intention to the contrary, a conveyance of real estate to a corporation for a purpose not authorized by its charter is not void, but voidable, and the sovereign alone can object. Neither the grantor nor his heirs nor third persons can impugn it upon the ground that the grantee has exceeded its powers. Smith v. Sheeley, 12 Wall. 358, 20 L. Ed. 430; Union National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; National Bank v. Whitney, 103 U. S. 99, 26 L. Ed. 443; Reynolds v. First Nat. Bank, 112 U. S. 405, 28 L. Ed. 733, 5 Sup. Ct. Rep. 213; Fritts v. Palmer, 132 U. S. 282, 33 L. Ed. 317, 10 Sup. Ct. Rep. 93; Leazure v. Hillegas, 7 Serg. & R. 313. Thus, although the statute by clear implication forbids a

National bank from making a loan upon real estate, the security is not void, and it cannot be successfully assailed by the debtor or by subsequent mortagees because the bank was without authority to take it; and the disregard of the provisions of the act of Congress upon that subject only lays the bank open to proceedings by the government for exercising powers not conferred by law. Union Nat. Bank v. Matthews and National Bank v. Whitney, supra; Swope v. Leffingwell, 105 U. S. 3, 26 L. Ed. 939."

Kerfoot, the plaintiff in error in that case, was an heir at law of the grantor in the deed to the bank, and it was argued in his behalf that the deed involved was void because prohibited by the National Banking Act, and that therefore the title to the real estate sought to be conveyed by such deed did not pass to the bank but remained in the grantor and upon his death passed to his heir, the plaintiff in error, but this court held that although he was the heir and successor in interest of the grantor in said deed, he could not raise the question that the act of the bank in accepting said deed was in contravention of the said National Bank Act and therefore ultra vires, but the opinion goes further and says that neither the grantor himself nor his heirs or third persons can raise the question of the ultra vires of the act. This is equivalent to holding in the case at bar that not even Helmick himself could raise the question sought to be raised, much less the plain-

tiff in error, who must be classed as a third person in his relation to the assignment of the judgment in question.

In the same opinion Mr. Justice Hughes quotes with approval the following from the case of **National Bank v. Matthews**, 98 U. S. 621, 25 L. Ed. 188:

> "The opinion of the Supreme Court of Missouri assumes that the loan was made upon real estate security within the meaning of the statute, and their judgment is founded upon that view. These things render it proper to consider the case in that aspect. But, conceding them to be as claimed, the consequence insisted upon by no means necessarily follows. The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined. * * *
>
> "Where a corporation is incompetent by its character to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. Leazure v. Hillegas, supra; Goundie v. Northampton Water Co., 7. Pa. 233; Runyan v. Coster, 14 Pet. 122, 10 L. Ed. 382; Banks v. Poitiaux, 3 Rand.

(Va.) 136, 15 Am. Dec. 706; McIndoe v. St. Louis, 10 Mo. 577. See also Union Gold Min. Co. v. Rocky Mt. Nat. Bank, 96 U. S. 640, 24 L. Ed. 648."

The above opinion was followed by Mr. Justice Field in the case of **National Bank of Genessee v. Whitney,** 103 U. S. 99, 26 L. Ed. 443, in considering the validity of a mortgage given to a National bank to secure advances, from which opinion we quote as follows:

> "The decision in the case cited **(National Bank v. Matthews)** controls the present case, and in conformity with it we must hold that the mortgage to the bank, so far as subsequent incumbrances are concerned, is to be regarded as a valid security for the future advances to the mortagor. Whatever objection there may be to it as security for such advances from the prohibitory provisions of the statute, the objection can only be urged by the government."

In **Thompson v. St. Nicholas National Bank,** 146 U. S. 240, 251, 36 L. Ed. 957, 961, Mr. Justice Blatchford, delivering the opinion of the court, says:

> "Moreover, it has been held repeatedly by this court that where the provisions of the National Banking Act prohibit certain acts by banks and their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the

United States, and not by private parties."

We do not deem it necessary to continue these quotations. The decisions of this court upon this point are both numerous and harmonious as shown by the many authorities cited under Point 1 herein. Whether properly raised or not, but one conclusion is deducible therefrom, and that is, that the plaintiff in error cannot avail himself of the alleged federal question sought to be presented in this case.

A large portion of a bank's business consists of making collections of notes, checks, drafts, and other evidence of indebtedness as incidental to a banking business. The National Bank Act authorizes National banks to discount and negotiate notes, drafts, bills of exchange and **other** evidence of debt. It has been held that the two expressions "discount" and "negotiate," when taken together, have a broader sense than the word "discount" alone, and seem to have been used designedly by Congress to authorize National banks to invest their surplus in promissory notes, bills of exchange and **other evidence of debt** so as to make it remunerative. **Newport National Bank v. Board of Education** (Ky.), 70 S. W. 186.

"National banks, being authorized to carry on the business of banking, have authority to collect notes, checks, bills of

exchange and other evidence of debt for other persons, as an incident of the business, although the authority is not expressly mentioned in the National Bank Act." **Hansen v. Heard**, 69 N. H. 190, 38 Atl. 788, 789.

The defendant in the above case was the receiver of a National bank whose cashier, acting for the bank, had taken a savings bank book on a Minnesota bank for collection on behalf of the plaintiff and promised plaintiff when the same was collected to pay her a usurious rate of interest on the deposit. After making the collection the cashier credited the money to his own account, afterwards withdrew it and absconded. The bank was held liable for the collection.

The Prescott National Bank of Lowell, Massachusetts, purchased a promissory note indorsed by Benjamin F. Butler. Default having been made in the payment of said note the bank brought suit against the indorser, Butler, thereon. The defendant contended that the contract of purchase of said note by the bank was ultra vires and therefore the bank had no title to the note. The Supreme Judicial Court of Massachusetts (**Prescott Nat. Bank v. Butler,** 32 N. E. 909) in considering this contention of the defense in its relation to the National Bank Act said:

> "In the first place if such a purchase is ultra vires, it is an ordinary contract. It is not made penal, nor expressly for-

> bidden, and the maker or indorser cannot defend on the ground that the bank has obtained no title. The violation of law can be availed of only in proceedings against a National bank, in the interest of the public, to deprive it of its charter. This has been decided by the Supreme Court of the United States. **Bank v. Matthews,** 98 U. S. 621, and cases cited."

The defendant Butler was held liable to the bank on the note.

In **Mound City Paint Co. v. Commercial National Bank of Ogden,** 4 Utah 353, 9 Pac. 709, the plaintiff doing business in St. Louis, Missouri, sent a draft to the defendant for collection against an Ogden firm and the defendant having been negligent of its duty in the collection thereof, the plaintiff instituted a suit. The defendant in its defense insisted that the business of collecting drafts is ultra vires of a National bank and for that reason the undertaking to collect was not binding on the defendant, and in holding the defendant liable on its undertaking to collect the draft mentioned, the court quotes with approval Section 324 of Daniel on Negotiable Instruments, as follows:

> "The business of collecting commercial paper is a part of the regular business of banking; and it is not necessary that the charter of the bank specifically confer the power to engage in it upon the bank, as it is plainly within the powers

implied by the creation of such an institution."

In **Logan County National Bank v. Townsend,** 139 U. S. 67, 35 L. Ed. 107, cited by the plaintiff in error in his brief, the bank had purchased from Townsend certain Logan County bonds under an agreement with him to resell the same to him at the same price or less when he so desired. Thereafter the bonds, having risen in value, Townsend tendered to the bank the amount due under his said agreement and demanded the return of the bonds. The bank refused. In an action by Townsend against the bank for the value of the bonds and interest, he recovered judgment and on a review by this court Mr. Justice Harlan delivered the opinion in which he said:

> "We have said that the bank could hold the bonds, even if obtained by it without authority of law, as security for the money advanced to the plaintiff for them. This is only an application of the principle announced by this court in several cases involving the validity of transactions by National banks. In Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188, it appeared that a National bank loaned money upon the security of a note and deed of trust of lands, both of which were assigned to it. The statute declared that a National banking association could loan money 'on personal security,' and could purchase, hold and convey real estate for certain named purposes, 'and

for no others,' among which was not included the securing of a present loan of money by a deed of trust or mortgage on real property. The court, while assuming that the statute, by clear implication, forbade the bank from making a loan on real estate, refused to restrain the bank from enforcing the deed of trust. The decision went upon these grounds: That the bank parted with its money in good faith; that the question as to the violation of its charter, by taking title to real estate for purposes unauthorized by law, **could be raised only by the government in a direct proceeding for that purpose**; and that it was not open to the plaintiff in that suit, who had contracted with the bank, to raise any such question in order to defeat the collection of the amount loaned. If any doubt existed as to the scope of the decision in that case, it was removed by National Bank of Genesee v. Whitney, 103 U. S. 99, 26 L. Ed. 443, where it was held that the right of a National bank to enforce a mortgage of real estate taken by it to secure indebtedness then existing, as well as future advances, could not be questioned by the debtor, and that a disregard by the bank of the provisions of the Act of Congress upon that subject only laid the association open to proceedings by the government for exercising powers not conferred by law.

* * * * * *

"Our conclusion upon the whole case, so far as the questions arising in it may be reviewed by this court, is that, if the bank had no authority to purchase the

bonds in question, it is yet not exempt, by reason of anything in the National Banking Act, from liability to the plaintiff for the difference between the price it paid for them and their value at the time it refused, upon plaintiff's demand, to comply with the contract made by it for their purchase and held on to the bonds."

Under the foregoing authorities we are persuaded that the acceptance by the First National Bank of Payette of the assignment of the judgment in question for collection was not ultra vires, but was incidental to a general banking business, and if not included in the powers enumerated in the seventh subdivision of Section 5136, Revised Statutes, it is included in the third, viz., to make contracts. But the making of collections is incidental to the banking business. The judgment so assigned was a chose in action, an evidence of debt.

The fact that the bank agreed to collect this judgment without compensation does not change its right to accept the assignment of the judgment for the purpose of collection. Do not our bankers universally accept for collection without compensation checks upon other bankers for their depositors? Can it be said that the acts of our National banks in so accepting for collection from their depositors checks upon other banks, are ultra vires and void? Not every transaction negotiated by a bank is profitable in itself. **If banks were bound only by contracts**

which were profitable to them and could repudiate all unprofitable contracts as ultra vires, they would certainly hold a very unique place in the business world. In order to attract depositors and to retain them banks usually collect checks upon other banks for their depositors without compensation. The compensation comes to the bank in the continued patronage of the depositor.

Just why the First National Bank of Payette accepted the judgment in question for collection and agreed to collect the same without compensation the record does not disclose, but it is a matter of such common knowledge, and courts are entitled to take judicial knowledge of the fact that similar transactions occur every day in the banking business in the making of collections, we can see no reason why the action of the bank in this particular transaction should be held to be unusual and ultra vires. No doubt the hope of securing the deposit of the proceeds from the said judgment was the incentive that induced the bank to undertake the collection of said judgment without other compensation. Just the same hope induces every bank to perform similar favors many times during each and every business day.

It follows, therefore, from the foregoing authorities and reasons that the action of the First National Bank of Payette in accepting the assignment of the judgment in question was not

an act beyond its authority as a National bank, but was a transaction incidental to its general banking business and one which it had an implied power to perform.

Counsel for plaintiff in error assert that a National bank can not act as trustee of an express trust. This is rather a startling assertion to make in the face of the opinion of this court in Kerfoot v. Farmers and Merchants' Bank, 218 U. S. 281, 54 L. Ed. 1042, which they cite in their brief. We have already cited and freely quoted from that opinion; in fact, we think that opinion is decisive of this case. In that case the bank had accepted a deed conveying certain real estate to the bank in trust for certain persons and the paramount question before this court was whether or not the bank was capable of taking and holding the title to said real estate and of carrying out the terms of its trust. In other words, was the bank capable of acting as the trustee of an express trust? The opinion answered that question unequivocally and affirmatively in these words:

> "In the present case a trust was declared, and this trust should not be permitted to fail and the property to be diverted from those for whom it was intended, by treating the conveyance to the bank as a nullity, in the absence of clear statement of legislative intent that it should be so regarded. * * Assuming that the deed was accepted by the

> bank, it was effective to pass the legal title and the plaintiff in error as heir at law of the grantor can not question it."

The opinion in **National Bank v. Matthews,** 98 U. S. 621, 25 L. Ed. 188, also supports our contention on this point, holding that a trust deed is valid though accepted by a National bank in contravention of an express prohibition of the National Bank Act.

If a deed conveying real estate to a national bank in trust for certain persons is valid and conveys the legal title, although accepted by said bank in contravention of an express prohibition of the statute, how much greater is the reason that an assignment of a chose in action to the First National Bank of Payette, Idaho, not prohibited by any express provision of the statute, should be held valid and effective to convey the legal title thereof to the bank.

These authorities, we think, dispose of the contention of counsel for plaintiff in error that the First National Bank of Payette was not capable of acting as trustee of an express trust by accepting the assignment of the judgment in question under an agreement with the owner of said judgment, Mr. Helmick, to collect the said judgment and to pay a portion to Mr. Lauer and the balance to hold subject to Helmick's orders. Unless the bank was incapable of accepting said trust and of becoming the receptacle of the legal title to the said chose in action, the contention of plaintiff in error must fail.

We do not deem it necessary to enter into any extended argument as to the practice of this court on writs of error to the state courts in reference to the questions that will be reviewed. However, we call the court's attention to Points 5 and 6 and the authorities thereunder cited.

We have examined the authorities cited by counsel for plaintiff in error in their brief, and must say that in our opinion, they are not applicable to the facts of the case at bar. In many cases the quotations are dicta, the contracts in question are executory or the bank rescinds before performance. The law applicable to executory contracts will not fit this case, for the reason that not only the assignment of the judgment but the contract for the collection thereof in this case were completely executed as soon as the plaintiff in error as agent for the bank collected the judgment.

For the foregoing reasons, we submit that the writ of error should be dismissed and the judgment of the Supreme Court of the State of Oregon affirmed.

Respectfully submitted,

C. E. S. WOOD,
F. M. SAXTON,
Attorneys for Defendant in Error.

WILL R. KING,
in propria persona.

10

Supreme Court of the United States

OCTOBER TERM, 1911

No. 153

WILLIAM MILLER, PLAINTIFF ~~IN ERROR~~,

vs.

WILL R. KING, SUBSTITUTED FOR THE FIRST NATIONAL BANK OF PAYETTE, IDAHO, DEFENDANT IN ERROR.

REPLY BRIEF OF PLAINTIFF IN ERROR

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

JAMES H. RICHARDS,
OLIVER O. HAGA,
Attorneys for Plaintiff in Error.

SYMS-YORK CO., PRINTERS, BOISE, IDAHO

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WILL R. KING, SUBSTITUTED FOR THE FIRST NATIONAL BANK OF PAYETTE, IDAHO, DEFENDANT IN ERROR.

REPLY BRIEF OF PLAINTIFF IN ERROR

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

The contention of defendant in error that the writ of error in this cause should be dismissed for want of jurisdiction was not anticipated by us in our original brief, but the question having been raised we desire to call the attention of the Court to the record in this cause in so far as it relates to that question, also to a few authorities bearing on this contention.

The testimony in the record shows conclusively that the Bank had no interest whatever in the judgment or in the assignment thereof, and that it accepted it for the purpose of collection only, without compensation or remuneration, and that it pretended to hold it in trust,—although it did not bring the action as *trustee* but as owner of the judgment. That the question was raised in the Supreme Court of Oregon, and that that Court decided the Federal question

so as to give this Court jurisdiction conclusively appears from the opinion of the Court and from the assignment of errors in that court.

In referring to the Federal question which was earnestly presented and urged by plaintiff in error in that Court, the Supreme Court of Oregon said:

> *"It is said that a national bank cannot act as a trustee, but we do not understand how this question becomes important here. There is no rule of law preventing a national bank from taking an absolute assignment of a claim for collection and agreeing to pay the proceeds or part thereof to another. By such a transfer the legal title passes to the bank, and one acting as its agent or representative and collecting the money thereon, cannot refuse to pay it to his principal on the ground that it had no legal right to own such claim. In this case after the judgment had been assigned to the bank it directed the defendant to collect the amount due thereon for it, and he agreed to do so. When he made the collection it was his duty to pay it over to the bank, unless in fact the money belonged to another. And he cannot escape liability by setting up the defense that the bank had no right, in the first instance, to take the assignment."*

Under the statutes and rules of the Supreme Court of Oregon the assignment of errors does not appear in the record, but the errors assigned must be set out in the brief of appellant; hence they do not appear in the record of that Court as the same is certified to this Court in obedience to the writ of error. In order to get into the record in this Court the fact that the Federal question was presented to the Supreme Court of Oregon a stipulation was entered into between counsel for plaintiff in error and the defendant in error (Trans. p. 82). That stipulation provides:

> "a. That in the brief of appellant filed in the Supreme Court pursuant to the rules of such Court, the following assignment of error was made by appellant:

'The Court erred in instructing the jury that if the Bank took the assignment from Helmick upon a trust to pay a portion of the money received thereunder to Lauer, the authority of the Bank could not be revoked or the assignment rescinded or disaffirmed (p. 97, LL. 32-34), for the reason that, under the law, a bank cannot act as trustee under an express trust, and for the reason that there was no allegation in the pleadings that the assignment was made to the Bank in trust for Lauer.'

b. *That in the said brief of appellant, under the title, 'Points and Authorities', appellant stated that 'A National Bank cannot act as trustee under an express trust, and he takes no title under an assignment of a judgment to it for such purpose. A contract of trusteeship thus created, or attempted to be created, is ultra vires and void, and no action can be maintained thereon by or against the Bank.* (Citing cases.)."

It would seem therefore that the defendant in error should not be heard to say that the Federal question was not urged in the Supreme Court of Oregon or considered by that Court. The rules of practice of the Oregon Court in force at the time when this case was presented to and heard by that Court provided as follows in relation to the assignment of errors in that Court:

> "In cases for hearing at Pendleton, the appellant, except in equity cases to be tried anew, must serve a brief containing a concise statement of the errors relied upon, within thirty days after the appeal is perfected, and file the same in the Appellate Court at least ten days before the first day of the term." (50 Or. 589, 91 Pac. XIII).

The statutes of the State made no provision for assignment of errors in the transcript on appeal.

> Sec. 553 Bellinger & Cotton's Codes and Statutes of Oregon.

Malheur County is situated in the district for which causes are heard at Pendleton by the Supreme Court of Oregon.

Sec. 2470 Bellinger & Cotton's Codes and Statutes of Oregon.

It would be impossible for the record in the Supreme Court of Oregon to show the errors therein assigned by plaintiff in error in this Court, unless the brief filed by him in that Court be examined, hence the necessity of including by stipulation so much of the assignment of errors as pertain to the Federal question. The decision of the Court shows clearly that the question was presented and considered by that Court, and that the Court held and decided adversely to the rights and immunities claimed by plaintiff in error under the said laws and statutes of the United States. It is not material when the question was first raised so long as it was considered by the highest court of the State and decided adversely to plaintiff in error.

In the recent case of Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. Ed. 137, this Court took jurisdiction, as it had in previous cases where the Federal question was raised for the first time in the state court in the petition for rehearing. In that case this court said:

> "In the opinion upon the petition for a rehearing, the Court of Appeals announced that it found nothing in the statute which deprived the owner of due process of law within the meaning of the 14th Amendment. The Court having thus considered the Federal question, the objection is open here."

In the case of Sulley v. American National Bank, 178 U. S. 289, 44 L. Ed. 1072, this Court held that a question raised in the Supreme Court of a state and there decided, not on the ground that it was not raised in the lower court, but on its merits, is not raised too late for the purpose of review on writ of error from the Supreme Court of the United States.

The rule stated is also sustained by the following cases:

Rothschild v. Knight, 184 U. S. 334, 46 L. Ed. 573.

Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. Ed. 243.

The Case on Its Merits.

An examination of the cases cited by defendant in error will show that they are all cases where the parties had entered into contracts prohibited under the National Banking Act, and had received the benefits thereunder and that the other party endeavored to take advantage of the prohibition of the National Banking Act in a manner that would have defeated the right of the Bank to recover what was due it, and would have enabled the other party to unjustly retain what it had not paid for. In those cases the injustice of the situation appealed to the Court, and the correct rule to be applied in those cases was clearly stated by this Court in the case of Citizens' Cent. Nat. Bank v. Appleton, 216 U. S. 196:

> "In such cases, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an implied contract of the defendant to return or failing to do that to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm the unlawful contract."

This is also the doctrine of Kerfoot v. Farmers & Merchants Nat. Bank, 218 U. S. 281, although in that case the Court also applied the doctrine that a trust should not be permitted to fail and the property be taken from those for whom it was intended by the decedent, unless the statute in express words or by clear legislative intent compelled a construction to the effect that the conveyance of real property to the bank vested no title in the bank unless the conveyance was made for the specific purposes mentioned in Section 5137, U. S. Revised Statutes. The bank in that case was not seeking to establish a trust, or to carry out or enforce the unlawful contract, but, years after the bank had

parted with its title as trustee, heirs of the trustor were seeking to recover the property because of the alleged inability of the bank to pass title to its grantee.

In the case at bar the bank is seeking to *carry out the unlawful contract. It is using its National Charter and capital for a purpose not authorized by law.* Henry Helmick, who assigned the judgment to the bank, could not force or compel the bank to proceed with the collection thereof; he therefore had the right in September, 1903, to revoke the assignment to the bank, and having revoked the assignment he also had it in his power to ratify and approve the action of the plaintiff in error in paying the money to the Moss Mercantile Company. He had clearly the right to make settlement with the Moss Mercantile Company, and having done so, the bank could not continue the prosecution of its action or assign the cause of action, which it no longer held, to its attorney, Will R. King, defendant in error in this Court.

The contention that the bank had incurred expenses before the assignment was revoked, and that the assignment could not be revoked until such expenses had been paid by Henry Helmick, is not entitled to serious consideration. If the contract was unlawful or ultra vires to begin with, it could not be made valid or be brought within the statute by the bank proceeding to carry it out. Besides the bank had taken what it undoubtedly considered ample security for the costs (Trans. p. 27), and it clearly appears from the record in this case that the bank has been reimbursed for every dollar expended.

Respectfully submitted,

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MILLER v. KING, SUBSTITUTED FOR THE FIRST NATIONAL BANK OF FAYETTE, IDAHO.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 153. Argued January 22, 23, 1912.—Decided February 19, 1912.

While a national bank cannot act as trustee and hold land for third persons, under § 5136, Rev. Stat., it may do those acts that are usual and necessary in making collections of commercial paper and evidences of debt.

A national bank, under § 5136, Rev. Stat., may be assignee of a judgment to collect and distribute the amount thereof where the assignment is not made merely to enable it to sue in its own name.

Under the law of Oregon, a national bank holding a chose in action as trustee to collect and distribute may sue in its own name.

Quære: Whether any but the Government can raise the question that a national bank in acting as trustee violates § 5136, Rev. Stat. *Kerfoot* v. *Bank*, 218 U. S. 281.

53 Oregon, 53, affirmed.

THE facts, which involve the construction of § 5136, Rev. Stat., in regard to the extent of power of a national bank to act as trustee, are stated in the opinion.

Mr. James H. Richards, with whom *Mr. Oliver O. Haga* was on the brief, for plaintiff in error:

A national bank cannot act as trustee under an express trust.

The actions of the bank in this matter and the contract which it is pretended or claimed was entered into are clearly *ultra vires* and are not binding upon either the bank or the other parties to the contract. *Cent. Transp. Co.* v. *Pullman Car Co.*, 139 U. S. 24; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538; *California Bank* v. *Kennedy*, 167 U. S. 362; *Louisville &c. R. R. Co.* v. *Louisville Trust Co.*,

174 U. S. 552; *Concord &c. Nat. Bank* v. *Hawkins*, 174 U. S. 364; *Bowen* v. *Needles Nat. Bank*, 94 Fed. Rep. 925; *Chemical Nat. Bank* v. *Havermale*, 120 California, 604; *Kerfoot* v. *Farmers' Bank*, 218 U. S. 281; *Citizens' Nat. Bank* v. *Appleton*, 216 U. S. 196.

The doctrine of *ultra vires* has been applied most rigidly to banks operating under the national banking act. *Logan County Bank* v. *Townsend*, 139 U. S. 67; *Merchants' National Bank* v. *Wehrmann*, 202 U. S. 295; *First National Bank* v. *Converse*, 200 U. S. 425.

It cannot be contended that the contracts entered into in this case come within such incidental powers as shall be necessary to carry on the business of banking. *Oregon Railway & Navigation Co.* v. *Oregonian Railway Co.*, 130 U. S. 1; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538, 549.

Any contract or act of a national bank beyond the powers expressly conferred upon it by the statute or fairly implied therefrom and necessary in order to carry on the banking business, is *ultra vires* and void. Cases cited *supra* and *Commercial Nat. Bank* v. *Pirie*, 82 Fed. Rep. 709; *Farmers' & Merchants' Nat. Bank* v. *Smith*, 77 Fed. Rep. 129; *McCrory* v. *Chambers*, 48 Ill. App. 455; *Weckler* v. *First Nat. Bank*, 42 Maryland, 581; *First Nat. Bank* v. *Ocean Nat. Bank*, 60 N. Y. 278; *Wiley* v. *First Nat. Bank*, 47 Vermont, 546; *Third Nat. Bank* v. *Boyd*, 44 Maryland, 47; *Dresser* v. *Traders' Nat. Bank*, 165 Massachusetts, 120; *Lazear* v. *Nat. Union Bank*, 52 Maryland, 78; *Norton* v. *Bank*, 61 N. H. 589; *Cumberland &c. Co.* v. *Evansville*, 127 Fed. Rep. 187; *Davis* v. *Old Colony R. R. Co.*, 131 Massachusetts, 258.

An *ultra vires* contract is void; not merely voidable. When a contract is *ultra vires* as to one party to it, the other party to the contract may treat it as invalid. *Central Transp. Co.* v. *Pullman Car Co.*, 139 U. S. 24; *St. L. &c. Ry. Co.* v. *Terre Haute &c. Ry. Co.*, 145 U. S. 393; *Pittsburg &c.*

Ry. Co. v. *Keokuk &c. Co.*, 131 U. S. 371; *Jacksonville N. P. R. R. & M. Co.* v. *Hooper*, 160 U. S. 514, 515; 1 Page on Contracts, § 310.

No action can be maintained on an *ultra vires* contract. Cases *supra*. No action can be maintained by the bank based on an assignment which it had no authority to accept. *Ashbury* v. *Riche*, L. R. 7 H. L. 653; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538; *De La Vergne Co.* v. *German Savings Institute*, 175 U. S. 40, 65; *Bosshardt* v. *Crescent Oil Co.*, 171 Pa. St. 120; *Thomas* v. *West Jersey Ry. Co.*, 101 U. S. 71; *Penna. R. R. Co.* v. *St. L. &c. Co.*, 118 U. S. 290.

The revocation of the bank's authority revoked all authority which the bank had in the matter. *Taylor* v. *Burns*, 203 U. S. 120; 1 Clark & Skyles on Agency, §§ 157–162 and 433; *Frink* v. *Roe*, 30 California, 296, 309; 2 Ency. L. & P. 1249–1250.

The Federal question is in time if raised at or before the hearing in the higher state courts. *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140; *Sulley* v. *American National Bank*, 178 U. S. 289; *Rothschild* v. *Knight*, 184 U. S. 334; *Arrowsmith* v. *Harmoning*, 118 U. S. 194.

Mr. Will R. King, in propria persona, with whom *Mr. C. E. S. Wood* and *Mr. F. M. Saxton* were on the brief, for defendant in error:

This court has no jurisdiction. It does not appear from the record that a title, right, privilege or immunity was claimed under the Constitution, or a treaty, or a statute of or an authority exercised under the United States was set up in the state court and was passed upon adversely to plaintiff in error. *Zadig* v. *Baldwin*, 166 U. S. 485; *Sayward* v. *Denny*, 158 U. S. 180; *Harding* v. *Illinois*, 196 U. S. 78; *California Powder Works* v. *Davis*, 151 U. S. 389; *Schuyler Nat. Bank* v. *Bollong*, 150 U. S. 87; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238.

Where the provisions of the National Bank Act prohibit certain acts without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States and not by private parties. *Kerfoot* v. *Farmers' Bank*, 218 U. S. 281; *Union Nat. Bank* v. *Matthews*, 98 U. S. 621; *National Bank* v. *Whitney*, 103 U. S. 99; *Xenia First Nat. Bank* v. *Stewart*, 107 U. S. 677; *Thompson* v. *St. Nicholas Nat. Bank*, 146 U. S. 240; *Union G. Mining Co.* v. *Rocky Mt. Nat. Bank*, 96 U. S. 240; *Fortier* v. *New Orleans Nat. Bank*, 112 U. S. 439; *Logan County Nat. Bank* v. *Townsend*, 139 U. S. 77; *Reynolds* v. *Crawfordsville Nat. Bank*, 112 U. S. 405; 5 Fed. Stat. Ann. 83.

A national bank may engage in the business of collecting notes, bills of exchange, and other evidence of debt as an incident of the banking business although the authority is not expressly mentioned in the statute. *Mound City Paint Co.* v. *Commercial Nat. Bank*, 4 Utah, 353; *Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67; *Keyes* v. *Hardin Bank*, 52 Mo. App. 323; *Hanson* v. *Heard*, 69 N. H. 190; *Newport Nat. Bank* v. *Board of Education* (Ky.), 70 S. W. Rep. 186; *Yerkes* v. *Nat. Bank*, 69 N. Y. 386; *White* v. *Third Nat. Bank*, 7 Ohio Dec. 666; *Prescott* v. *Nat. Bank* (Mass.), 32 N. E. Rep. 909.

A national bank may act as trustee of an express trust. *Kerfoot* v. *Farmers' Bank*, 218 U. S. 281, 287; *National Bank* v. *Matthews*, 96 U. S. 621.

Rev. Stat., § 5136, contains no prohibition against a national bank taking a judgment for collection and accepting an assignment thereof for that purpose.

The Federal court will look beyond the Federal question only when it has been decided erroneously and then only to see whether there are any other matters adjudged by the state court sufficiently broad to maintain the judgment. *McLaughlin* v. *Fowler*, 154 U. S. 663; *Waters-*

Pierce Oil Co. v. *Texas*, 212 U. S. 86, 99; *Thompson* v. *St. Nicholas Nat. Bank*, 146 U. S. 240.

Questions of fact will not be reviewed on a writ of error from this court to the highest court of a State. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 99; *Eagan* v. *Hart*, 165 U. S. 188; *Clipper M. Co.* v. *Eli M. Co.*, 194 U. S. 220; *Kerfoot* v. *Farmers' Bank*, 218 U. S. 281, 288.

MR. JUSTICE LAMAR delivered the opinion of the court.

Miller, the plaintiff in error, was the attorney of Helmick in an action against Porter. The judgment obtained in that suit was assigned by Helmick to the First National Bank of Fayette, Idaho, which executed an instrument reciting that it would hold any money collected subject to the order of Helmick. At the time of making the assignment Helmick gave verbal instructions to pay part of the money when collected to Lauer. The bank placed the judgment in the hands of Miller, who collected the money, and, claiming to act as attorney for Helmick, paid over the proceeds to the Moss Mercantile Company, which asserted that the cause of action had been transferred to it prior to the rendition of the judgment. The bank thereupon brought suit against Miller for the recovery of the money thus collected by him and paid over to a third party. The defendant answered, denying that the bank had title; alleging that it had paid no consideration for the transfer; that it was intended to defraud creditors; setting up that Helmick had revoked the assignment and had given Miller a release. There was, however, no claim that the charter of the bank prevented it from taking the transfer or prosecuting the suit.

There were several trials of the case, and ultimately, with the consent of Helmick and Lauer, the bank assigned the judgment to King. He was substituted as plaintiff, and recovered a judgment against Miller. The case was

taken to the Supreme Court, where it was contended that a national bank could not act as trustee of an express trust so as to be able to institute and maintain a suit under the statute of Oregon, which provides that the trustee of an express trust may sue without joining the person for whose interest the action is prosecuted. The judgment was affirmed, and no Federal question is presented in the writ of error here except on the theory that, under Revised Statutes, § 5136, a national bank could not act as trustee of an express trust, and that therefore the suit was absolutely void, and could not proceed to judgment in the name of the substituted plaintiff.

A national bank cannot act as a technical trustee and hold land for the benefit of third persons. It cannot, for example, act as trustee under a railroad mortgage, nor take title to property to be held for the life of the grantor, with remainder to his children. Every such transaction would be voidable at the instance of the Government. *Kerfoot* v. *Farmers' Bank*, 218 U. S. 281. But under Revised Statutes, § 5136, "it may exercise all such incidental powers as shall be necessary to carry on banking," and it may therefore act as a fiduciary and occupy a trust relation in matters connected with that business. It may do those acts and occupy those relations which are usual or necessary in making collections of commercial paper and other evidences of debt. It is both usual and proper for the legal title to negotiable instruments to be vested in a bank by mere endorsement for purposes of collection, holding the proceeds as the endorser directs. There is no difference in law if the title is conveyed by a lengthier and more formal instrument. In both cases the bank takes the legal title for the purpose of demand and collection. In a proper case, there is no reason why it might not go further and institute suit thereon in its own name for the recovery of what may be due. If the transfer was made, or the suit was being maintained, for purposes not

authorized by the charter of the bank, and if the defendant was in a position where his rights were prejudiced thereby, it would be incumbent on him to raise that defense at the outset of the litigation, or as soon as he learned that fact.

In this case the assignment was made in order that the bank might collect the money, pay part to Lauer, and, in effect, hold the balance on deposit to the credit of Helmick. The judgment was not transferred to the bank for the mere purpose of enabling it to bring suit in its own name. At the time of the transfer no suit was contemplated, and, indeed, none was necessary, because the money was immediately paid by Porter. Suit only became necessary when the amount collected by Miller was later improperly paid over by him to the Moss Mercantile Company. There was nothing in this transaction which was so disconnected with the banking business as to make it in violation of Rev. Stat. § 5136, even if the defendant could raise such question. *Kerfoot* v. *Bank*, 218 U. S. 281. The laws of Oregon permitted an action to be maintained by the bank in its own name. There is no Federal question before us which authorizes a reversal, and the judgment is

Affirmed.